(23,911)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 760.

ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD, PUBLIC SERVICE COMMISSION OF THE STATE OF VERMONT, APPELLANTS,

vs.

RUTLAND RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

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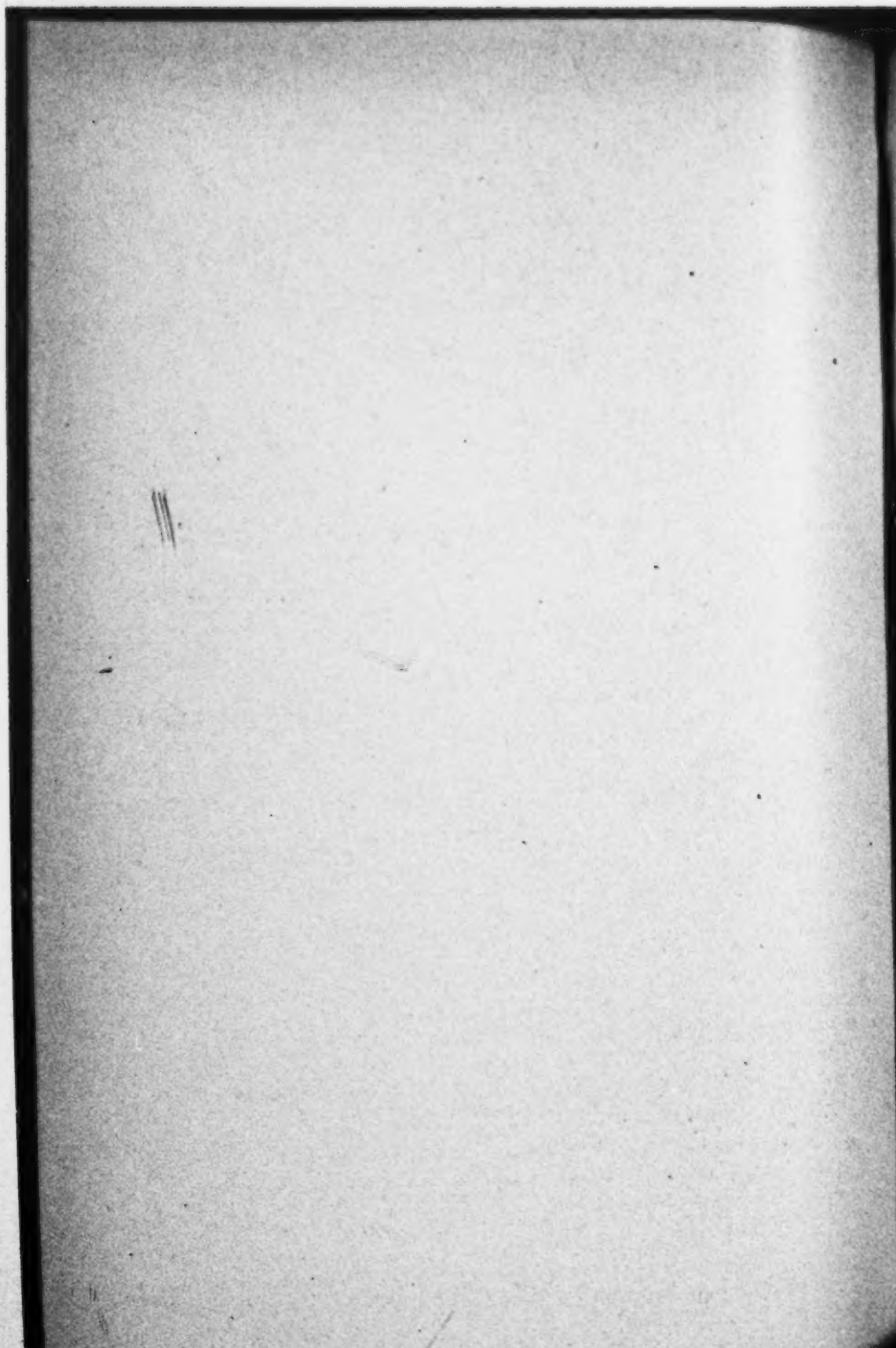


1 *Bill of Complaint.*

In the District Court of the United States in and for the District of Vermont. In Equity.

RUTLAND RAILROAD COMPANY

v.

ROBERT C. BACON, WILLIAM E. WARNER, and GEORGE H. BABBITT, Public Service Commission of the State of Vermont.

To the Judge of the District Court of the United States in and for the District of Vermont:

The Rutland Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Vermont, and having its principal place of business in the City of Rutland and State of Vermont, brings this its bill of complaint against Robert C. Bacon, William E. Warner and Geo. H. Babbitt, all citizens and residents of the State of Vermont, constituting the Public Service Commission of the State of Vermont;

And thereupon complaining says:

1. Your orator owns and operates a certain line of railroad extending from Ogdensburg, in the State of New York, to Bellows Falls in the State of Vermont; said railroad running through Alburg, Burlington, Vergennes and Rutland, in the State of Vermont; and a certain other line of railroad extending from the City of Rutland, in the State of Vermont, to Chatham, in the State of New York, running through Arlington and Bennington in the State of Vermont; and a certain other line of railroad extending from Leicester Junction, co-called, in the State of Vermont, to Ticonderoga, in
2 the State of New York; and a certain other line of railroad extending from Alburg in the State of Vermont, to Noyan Junction, in the Dominion of Canada; and operates a line of railroad extending from Noyan Junction to Montreal, in said Dominion of Canada; and at various points in the State of New York and State of Vermont connects with various other railroads in connection with some of which it operates through trains both passenger and freight. Your orator as a common carrier transports passengers and freight over all of said lines of railroad, excepting said line from Noyan Junction to Montreal, over which it carries passengers.

2. Your orator maintains in the City of Vergennes, a passenger station and a freight station, stopping passenger trains at said Vergennes to take on and discharge passengers, and receiving and delivering freight at said Vergennes station.

3. At said Vergennes your orator owns a tract of land for station purposes and providing freight facilities, extending westerly from its main line track to the highway leading from the City of Vergennes to Ferrisburg, and bounded southerly by what was formerly Main Street, and northerly by the said road leading from Vergennes to

Ferrisburg through an underpass for travel of teams under said railroad constructed about 1907; said tract of land is in dimensions approximately 175 feet east and west, and 900 feet north and south.

4. Your orator's station at said Vergennes consists of a frame building in good repair, and in dimensions 20.4 feet east and west by 50.5 feet north and south, with a slight projection in the station agent's office on the east side and in the center of the build-
3 ing, and another projection on the west side of said building for toilet facilities, and another projection at the north for baggage room—said projection being about 12 feet square; said station is located about 350 feet north of what was formerly the north line of Main Street, which your orator is informed and believes and therefore avers has been the location of said passenger station ever since the railroad, which your orator now owns and operates, was built prior to 1850. In said passenger station at the south end there is a waiting room for men 19 feet long and 18.5 feet wide, which has in it 15 seats along the east and south sides of the room, and 6 additional seats may conveniently be placed along the west side of said room, if necessary, for the accommodation of passengers. The women's waiting room at the north end of said station is of the same size and has the same number of seats as the men's waiting room. The ticket agent's office is located between said two waiting rooms, there being a passage connecting said two waiting rooms westerly of said ticket agent's office. There is a door from each of said waiting rooms to the platform east of the station and there is also an entrance from the outside to the hall connecting said waiting rooms on the west side of said station. Said building is of good construction and the rooms in it are high and light.

5. Your orator's freight house at said Vergennes is a frame building in dimensions about 104 feet north and south, and 30.5 feet east and west, located so that the north side of said freight house is about 60 feet south of the south side of said passenger station, and so that the east side of said freight house is a little west of a line extending along the east side of said passenger station, and your orator
4 is informed and believes and therefore avers that said freight house has been so located since the road, now owned and operated by your orator, was built prior to 1850.

6. Your orator delivers and receives at said Vergennes a large amount of freight to be unloaded direct from freight cars to teams, or loaded direct from teams to freight cars, and prior to 1907 cars for this purpose were placed on tracks easterly of your orator's main line track teams from Vergennes passing over your orator's tracks at Main Street. In the year 1907 the access to said tracks easterly of the main line track for teams from the City of Vergennes by way of Main Street leading over your orator's tracks south of said station buildings, was cut off by the closing of said highway across your orator's tracks by order of the Public Service Commission of the State of Vermont, acting pursuant to the statutes in such case made and provided, and a new highway opened and built along the westerly line of your orator's said land from a point in Main Street about 200 feet westerly of your orator's main line track to a point

about 900 feet northerly from the point where said Main Street formerly crossed your orator's track, through an underpass constructed in accordance with said order of said Public Service Commission. By reason of said closing of said Main Street and construction of said new highway, and underpass, teams carrying freight to and from the City of Vergennes were required to travel much farther than formerly, to wit, about 1,500 feet, in order to reach cars placed on said tracks easterly of your orator's main line track.

7. For about two years after the closing of said Main Street crossing, a short spur track southerly of said station buildings and westerly of said main line track was used for placing a few cars for use of those handling freight from cars to teams or teams to cars.

8. In 1909 the Slawson Decker Company purchased land westerly of and adjoining your orator's right of way, and southerly of and adjoining said Main Street, and constructed thereon a large milk station and ice house, where it receives from farmers in said Vergennes, and towns in said vicinity, large quantities of milk, which it ships over your orator's line southerly to points in New York State. The construction of said milk station made it necessary for your orator to devote said short spur track westerly of your orator's main line to said milk business, as it was necessary to place cars upon said track in which would be loaded said milk, and also cars of coal and other material to be unloaded.

9. Your orator at the solicitation of the persons shipping and receiving freight at said Vergennes station, and in order to better accommodate them in the latter part of the year 1912, and the early part of the year 1913, built a spur track, hereinafter called the "team track," about 900 feet in length leading from the main line track at a point just southerly of said underpass to a point about 50 feet northerly of what was formerly the north line of said Main Street. The Southerly end of said side track for about 400 feet, and to a point opposite said passenger station, is about 50 feet east of the westerly line of said highway constructed at the time said Main Street crossing was closed, and from a point opposite said passenger station runs northerly diagonally to connect with the main line just southerly from said underpass. This track was built, and is now used, to place cars upon for delivery of freight from the cars to teams and loading of freight from teams to cars, and to serve warehouses.

10. For a long time prior to the construction of said team track, there were located upon land owned by your orator between said freight house and what was formerly Main Street, two warehouses for storing freight, owned by patrons of your orator, who shipped or received large quantities of freight; said warehouses being built and owned by said patrons who leased the land of your orator. Although your orator contemplated the construction of said team track during the year 1912, it was not completed until the early part of the year 1913. It was also a part of your orator's plans made during the year 1912 to cause said warehouses formerly located south of your orator's freight station, to be moved to the southerly end of said spur track and westerly thereof, and to connect the spur track

serving said milk plant, connecting with your orator's main line track southerly of said milk station, with your orator's main line track at its northerly end so that cars carried by trains going north could be set off on said track without delay and with greater safety.

11. During the month of April, or thereabouts, J. A. Harrington of the City of Vergennes, owned one of the aforesaid warehouses, being a building about 40.4 feet by 20.4 feet, and in accordance with plans of said Railroad Company caused said building to be
7 moved to the westerly side of said team track at the southerly end thereof. Your orator contemplated causing the other of said warehouses, being a building about 52.3 by 20.4 feet, to be moved to a point just south of said Harrington's warehouse, as now located, but on account of unsettled conditions has not yet caused this to be done. Your orator is informed and believes and therefore avers that other persons doing large freight business wish to locate warehouses for freight on the westerly side of said team track.

12. On or about the 21st day of July, 1913, your orator caused said spur track serving said Slawson Decker Company's milk station, to be connected with its main line track at its northerly end at a point about 50 feet southerly from the southerly side of your orator's freight station, in accordance with its said plans.

13. Your orator further contemplated that when said changes were completed it would construct a side-walk from the walk in said Main Street to the southerly end of its platform which is just south of said freight house.

14. Your orator operates through said city of Vergennes daily, excepting Sundays, passenger trains leaving Vergennes as follows, which regularly take on and discharge passengers at that point: going north, 4.16 a. m., 8.30 a. m., 11.55 a. m., 3.45 p. m., 6 p. m., and 10.20 p. m.; going south, 9.02 a. m., 12.31 p. m., 4.25 p. m., 10.20 p. m. On Sundays the schedule of passenger trains of your orator leaving Vergennes and taking on passengers there, is as follows: going north, 4.16 a. m., 11.55 a. m., 6 p. m.; going south 12.31 p. m., 6.37 p. m. and 10.20 p. m.

8 15. Your orator is informed and believes and therefore avers, that the average number of passengers taking your orator's trains at said Vergennes, does not exceed 70 per day, and the average number per train is less than 10; frequently from 15 to 25 passengers board a train of your orator at said Vergennes, but it is only infrequently that more than 30 board a train at said station. Your orator is informed and believes and therefore avers that the population of Vergennes is 1,483, and its population is less than it was in 1890, and prior thereto.

16. The platform of your orator at said station is about 400 feet in length and varies in width from about 10 feet to about 16 feet.

17. The business section of said City of Vergennes and most of the residences are located more than 4,000 feet from your orator's passenger station.

18. On the 8th day of August, 1913, there was filed with the Clerk of the Public Service Commission, the following order:

No. 297.

CITIZENS OF VERGENNES
vs.
THE RUTLAND RAILROAD CO.

Hearings at Vergennes May 1, 1913, and July 22, 1913.

Present:

Commissioners Watson and Babbitt, Clerk and Stenographer. Commissioner Warner did not sit on account of interest, he being a member of the Board of Trade which headed the petition.

Appearances:

G. W. Stone, Esq., Attorney for petitioners and for the Sheffield Farms Slawson Decker Company, the Town of Ferrisburg and Louis Renaud.

E. W. Lawrence, Esq., General Attorney for the Rutland Railroad Company.

Frank Tuttle, Esq., State's Attorney, for the State.

9 *Report.*

This was a petition, afterwards supplemented by an additional petition or amendment, brought by Rev. L. A. Vezina as president of the Board of Trade of Vergennes, and about eighty others, citizens of Vergennes against the Rutland Railroad Company alleging that the passenger station of defendant at that place is inadequate and unfitted for the city of Vergennes and is in many ways an inconvenience to the traveling public. The amendment referred to alleges that said passenger station is located at a point not suitable for the reasonable accom-odation of the public; that at least two other locations are more practicable, both southward of the present station and indicated on blue print plans submitted with the petition and made a part thereof and marked "Plan A" and "Plan B," respectively. The prayer of the combined petition and amendment requests us to consider both the original and amended petition together and to direct the petitioner to erect and maintain a suitable passenger depot or station at one of said proposed locations, and further praying that this commission determine the kind of depot to be erected and fix a time within which the work shall be done.

After due notice a hearing was had at the City of Vergennes on May 1, 1913, and evidence taken, but no order was then issued and subsequently the amended petition was filed on July 8, 1913, and final hearing was had on July 22, 1913, at which time both petitions were considered as one without objection by any party interested.

From a consideration of the evidence and our personal observation and examination of the localities of the present station and the proposed new locations, and of conditions at the present station, we

find the allegations of these petitions to be true; that the present passenger station facilities are inadequate and that the public good requires that new or better facilities be furnished. We find that this object can be reasonably accomplished by moving the present station, repairing and enlarging it, by moving the present freight house, water stand-pipe, and a warehouse now on land of petitioner, by shortening a certain switch track used for the accom-odation of said Sheffield Farms Slawson Decker Company, and by constructing proper platforms, coverings or awnings, sidewalks and other necessary changes, and by shortening the local freight delivery track west of said proposed new passenger depot so that it shall not pass southward beyond the northerly end of the new passenger station above contemplated.

We conclude therefore that the necessities of the case and public convenience, safety and accom-odation require us to make and we do therefore make the following Order:

The Rutland Railroad Company is hereby ordered to erect and maintain at the City of Vergennes upon the line of its railroad a passenger station or depot at a point as shown in "Plan A," above referred to and attached to this order and made a part hereof to the extent and for the purposes herein prescribed.

This order may be complied with either by erecting an entirely new station substantially as shown in said "Plan A", or by utilizing the present depot. If the latter option is selected said old station or depot shall be removed to a point indicated on said plan for the location of said new station; it shall be enlarged by at least fifteen feet in length; it shall have new toilet rooms, improved heating facilities, general overhauling and repairs and be painted and in all respects put in good condition and repair; it shall also be so located as to have at least fourteen feet clear space between the East wall of the depot and the furthermost west rail of the tracks lying to the east thereof, suitable platforms and platform awnings shall be furnished.

The water stand-pipe shall be moved to some other place convenient for use by petitionee, but so as not to interfere with the safe and convenient use of the station by the public. The switch at the north end of the Sheffield Farms, Slawson Decker Company siding shall be established at least one car length south of its location on said July 22, 1913, in the south end of the local freight delivery track and certain warehouses west of said station shall at the early convenience of the petitionee be removed so that said warehouses and track or future tracks will not extend southwardly beyond the north-ly line of the passenger station building as therein newly located.

The present freight house shall be removed to a convenient point north of the newly located passenger station. The warehouse now located just south of the present freight house shall be removed to a convenient place, but so as not to interfere with the intent or purpose of this order.

In connection with said newly located passenger station a baggage

room shall be furnished and maintained and kept warm for the reception of perishable goods.

The obvious and necessary changes shall be made by petitionee so as to make the new station proper, adequate and convenient for the public use and to fulfill the intent and spirit of this order, among which shall be a suitable sidewalk to connect the southerly end of said newly located station platform with the end of the city sidewalk nearest the station, and the city of Vergennes shall construct its sidewalk to a point in the westerly limits of petitionee's right of way so that said sections of walk shall connect. Petitionee shall also properly grade the ground about said new station so that teams may at all times approach and have convenient access to said station platform on the westerly side thereof.

The work herein prescribed to be done shall, unless otherwise specified, be completed on or before January 1, 1914, and shall be subject to the approval of this Commission.

Dated At St. Albans, July 24, 1913.

CHAS. D. WATSON,
GEORGE H. BABBITT,
Vermont Public Service Commission.

11 Office of Clerk: Aug. 8, 1913. Filed: S. S. Watson. Attest: —— ——, Clerk.

19. Your orator in its answers to said petitions referred to in said order filed before the hearings referred to in said order, denied the allegations of said petitions and averred that the said plans referred to in said petitions involved wholly unnecessary and unreasonable expense, and would impose upon your orator undesirable and unreasonable operating conditions, and further alleged that said petitions were insufficient to give the Public Service Commission jurisdiction or power to act in the premises, and denied the authority of the Public Service Commission to carry into effect either of the plans referred to in said petitions, and at said hearings before said Public Service Commission your orator submitted evidence in support of its answers. Your orator's answers set out its said plans for changes and improvements at said Vergennes.

Plan A referred to in said order of said Commission requires the location of the passenger station at a point about 220 feet south and two and one half feet west of its present location, and the location of the freight house at a point about 225 feet north of its present location; and requires the moving of the water column from which water is taken by engines about 220 feet southerly; requires the taking up of about 200 feet of the said team track on the south end; the moving of the warehouse owned by said Harrington about 220 feet northerly from its present location; construction of a large amount of new platform; the expenditure of a large amount of money in grading, and the building of a new station the size of the present one, or enlarging and moving the present station, and will result in placing the passenger station at a point near the southerly end of the plat-
12 form, as it will be necessary to construct it under said plan, instead of in the middle of the platform.

The cost of carrying out the said order of said Commission by building an entirely new station, will exceed Six Thousand ($6,000) and the expense of Carrying out said order of moving and utilizing the present passenger station, will exceed Four Thousand Dollars ($4,000).

The freight facilities furnished by said team track are not at present more than sufficient to accommodate the warehouses and team track business of your orator at Vergennes, and to take up the track required by said order will seriously curtail and render inadequate the freight facilities of your orator at Vergennes, and be a great inconvenience to your orator and to the freight shippers at that point.

21. Your orator further complaining says, that the passenger station and facilities at said Vergennes are reasonably adequate and convenient for the traveling public, and that the point at which said passenger station is now located, and has been located for more than 60 years, reasonably accommodates the public; and said order of the Commission requires your orator to make changes and spend a large sum of money, to wit, more than Four Thousand Dollars ($4,000) without materially changing the passenger facilities and passenger station or the location thereof.

22. Your orator further avers, that its outstanding capital stock consists of $9,057,600 par value 7 per cent., cumulative preferred stock and $199,400 par value common stock, said common stock being valueless because of the large amount of unpaid dividends which have accumulated on said preferred stock. No dividends have been paid by your orator since January 1, 1909, and
13 the average dividends on said preferred stock for the years 1900 to 1908 both inclusive was less than two per cent per year. Your orator in recent years by careful and economical management has been able to make a small net profit, to wit, $125,000 per year, a part of which your orator has been required by law to expend on improvements, and the rest of said surplus has been expended to care for improvements made necessary by increase in your orator's volume of business. Your orator suffered great loss, to wit, $100,000 on account of the unusual floods in the early part of the present year, which together with increased expenditures made necessary by taxes and operating expenses, indicate that your orator will have a deficit as the result of its operations for the year 1913, without declaration of any dividends upon its stock. Your orator avers that it is prudent and necessary in the safe conduct of your orator's business to spend as much money as it has available upon maintenance and improvement of its road bed, and rolling stock, and that it is imprudent and unwise to expend its money in improvement of passenger stations and passenger grounds which are now reasonably safe and adequate.

3. The matter in controversy herein exceeds exclusive of interest and cost the sum or value of Three Thousand Dollars.

24. Your orator is informed and believes and therefore avers, that said order is for the aforesaid reasons, confiscatory, arbitrary and beyond the power of the Commission, and if enforced will result in taking property of your orator without compensation and without

due process of law, and denying to your orator equal protection of the law, in violation of the Constitution of the United States
14 and of the State of Vermont and is void particularly because it arbitrarily, unlawfully and without reasonable cause therefor, requires the change in the location of said passenger station, warehouses and freight house, the removal of tracks now used for freight facilities, the building of a new station, or large expenditure of money upon the present passenger station, the expenditure of a large sum of money for construction of platform, and awnings and seriously interferes with the convenient operation of your operator's railroad, and unreasonably, unnecessarily and without compensation deprives your orator of the use of its land and tracks.

25. Your orator is informed and believes and therefore avers, that said order is void, and if enforced will result in taking your orator's property without compensation and without due process of law, and denying to your orator equal protection of the law, in violation of the Constitution of the United States and of the State of Vermont, because:

(*a*) There was no evidence submitted to said Commission at said hearings referred to in said order tending to show that the present passenger station is inadequate or unfitted for the City of Vergennes, or an inconvenience to the traveling public, or that the present location of the passenger station was not suitable for the reasonable accommodation of the public.

(*b*) The passenger station provided on Plan A is substantially the same size as the present passenger station, whereas, said order requires your orator in case it moves the present passenger station to enlarge it by extending it 15 feet, and all of the evidence tended to show that the present passenger station reasonably accommodates the passengers using said station.

15 (*c*) The petitions upon which said order is based are insufficient in that no allegations are made of the respects in which said passenger station at Vergennes is inadequate and unfit for the City of Vergennes, and an inconvenience for the traveling public, or in what way the present location of the passenger depot is not suitable for the reasonable accom-odation of the public and said Commission was without power to act in the premises.

(*d*) Said Commission, although required by statute, to find facts upon which this order is based, neglected so to do, and fails to find any facts upon which its conclusions that the passenger station at Vergennes is inadequate and unfitted for the City of Vergennes, and an inconvenience to the traveling public, and is located at a point not suitable for the reasonable accom-odation of the public, and that the public good requires new and better facilities, may be based. Said Commission finds no facts in respect to the number of passengers taking trains at Vergennes, condition of the present station, its location in respect to the City, and other pertinent matters, although such evidence was submitted to it upon said matters. And the failure of the Commission to find such facts leaves the Court without means of ascertaining whether the requirements of the order bear a

reasonable and just relation to the respects in which said Commission deemed your orator negligent or deficient in its duty.

(e) One of the facts found by said Commission upon which it bases its said order, is that said station is unfitted for the City of Vergennes, and said report and order leaves it uncertain as
16 to what weight said Commission gave to this fact. The question of whether or not the present passenger station is unfitted for the City of Vergennes is not one over which the Commission has jurisdiction, and said Commission erred in determining said question and giving weight to its determination of said question in making said order.

26. Your orator further alleges that said Robert C. Bacon, William E. Warner and George H. Babbitt, constitute the Public Service Commission of the State of Vermont; and that said defendants insist that your orator immediately proceed with the execution and carrying out of said report and order of the Public Service Commission; and your orator is informed and believes and therefore avers, that unless relieved by this Court from the necessity of complying with said order said Public Service Commission will take measures to compel your orator to comply therewith and will seek to impose great penalties upon your orator in case it refuses to obey said order, whereby your orator will suffer great and irreparable damage.

27. And your orator further avers that it is entitled to and therefore asks protection of this Court by way of injunction prohibiting said defendants attempting to enforce said order, and requiring your orator to carry out the provisions thereof; and avers that your orator is without adequate remedy at law in the premises.

Therefore your orator prays:

First. That said Robt. C. Bacon, Wm. E. Warner and Geo. H. Babbitt, constituting the Public Service Commission of the State of Vermont, and their successors in office, be enjoined and restrained durng the pendancy of this suit from instituting hearing or determining any complaint against your orator, its directors,
17 agents or servants, or any or either of them, for or on account of any act or thing by your orator, its directors, agents or servants, done, suffered or omitted to be done, which may be commanded by said order issued by said Public Service Commission, above set forth, and from instituting or prosecuting, or causing to be instituted or prosecuted, any action or proceeding, civil or criminal, against your orator, its directors, agents, or servants, or any or either of them, for or on account of any act or thing done, suffered or omitted, which may be forbidden or commanded by said order, and particularly from instituting or prosecuting any suit or proceeding, civil or criminal, before any of the courts of the State of Vermont, for the enforcement of said order made by said Public Service Commission, hereinabove set forth.

Second. That on final hearing of this cause said order of said Public Service Commission hereinabove set forth, be declared repugnant to the Constitution and laws of the United States, and of

the State of Vermont, and unconstitutional and void as to your orator.

Third. That the injunction hereinabove prayed for be made permanent as to each and all of the defendants hereinabove named, and the successors in office of each of said defendants.

Fourth. And may it please your Honor to grant unto your orator a writ of subpœna in due form directed to the said Robert C. Bacon, William E. Warner, and Geo. H. Babbitt, constituting the said Public Service Commission of the State of Vermont, as aforesaid,
commanding them to appear before your Honorable Court
18 on a rule day herein named, then and there to make answer
to this bill, but not under oath as the oath thereto is waived, and to abide judgment and decree of the Court thereon.

Fifth. For such other and further relief as your orator upon trial may be entitled to, and to your Honorable Court may seem meet.

RUTLAND RAILROAD COMPANY,
By GEO. T. JARVIS,
General Manager.

E. W. LAWRENCE,
Solicitor of Rutland Railroad Company.

STATE OF VERMONT,
Rutland County, ss:

On this 19th day of August, 1913, before me personally appeared George T. Jarvis, who being by me duly sworn, deposes and says, that he is the General Manager of said Rutland Railroad Company, and has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

GEORGE T. JARVIS.

Sworn to before me this 19th day of August, 1913.

MILDRED BROOKS,
Notary Public.

19 To Robert C. Bacon, William E. Warner, and George H. Babbitt, Public Service Commission of the State of Vermont:

On consideration of the foregoing bill of complaint you are ordered to appear before me on the 27th day of August, 1913, at 2.30 o'clock in the afternoon at the Judge's Chambers, at Brattleboro, in said District, to be heard on the question of granting the prayer for temporary injunction contained in the foregoing bill, and until such hearing you and each of you, are ordered to refrain from instituting or prosecuting any proceeding or action of any kind for the enforcement of the order of the Public Service Commission set out in said bill of complaint, or violation thereof by said Rutland Railroad Company, its officers, agents or servants.

It is further ordered that an attested copy of the original bill and

attested copy of this order be delivered to each of the defendants forthwith, in addition to the service on them of the usual subpœna.

Dated this 20th day of August, 1913.

JAMES L. MARTIN,
Judge of the District Court of the United States for the District of Vermont.

(Endorsed:) Filed August 21, 1913. Frederick S. Platt, Clerk.

20 United States District Court, District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
vs.
ROBERT C. BACON, WILLIAM R. WARNER, GEORGE H. BABBITT, Public Service Commission of the State of Vermont.

Petition for Leave to File Amended Motion to Dismiss Bill.

Now comes the defendants, Robert C. Bacon, William R. Warner, Park H. Pollard, constituting now the Public Service Commission of Vermont, and defendants in the above entitled cause, by Rufus E. Brown, Attorney General of the State of Vermont, and solicitor for the said defendants, and move this Honorable Court for leave to file an amended motion to dismiss the plaintiff's bill in the above entitled cause heretofore filed, which said amended motion is in words and figures as follows:

I.

Because this Honorable Court has no jurisdiction of the parties to said cause and the subject matters thereof or any of them for the reason that none of the matters and things in said bill in equity alleged, arise under the constitution or laws of the United States or treaties made, or which shall be made, under their authority,
21 and that all of the parties to said suit are citizens of the State of Vermont.

II.

Because the orator has a full, complete and adequate remedy at law in respect to each and every of the matters and things in said bill in equity complained of and alleged.

III.

Because by Section 4599 and 4600 of the Public Statutes of Vermont as amended by #108 and 116 of the Acts of 1908, any party to a cause who feels himself aggrieved by the final order, judgment or decree of the said Public Service Commission has a right to take the cause to the Supreme Court of Vermont by appeal for the correction of any errors excepted to in its proceedings or in the form or sub-

stance of its orders, judgments or decrees, on the facts found and reported by said Commission. Said Supreme Court may reverse or affirm the judgments, orders or decrees of said Commission and may remand the cause to said Commission with such mandates as law or equity shall require, and said Commission shall enter judgment, order or decree in accordance with such mandates and the parties shall be governed by the laws governing the Court of Chancery, of the State of Vermont, concerning appeals. The time for entering such appeal had not expired at the time of bringing the bill of complaint in this cause; upon taking the appeal as aforesaid the order, judgment or decree of said Commission shall be suspended during its pendency. Yet the plaintiff had not at the time of bringing said bill nor has it since availed itself of said right to appeal, therefore until such appeal is taken and final judgment, order or
22 decree made in the cause the plaintiff has no complaint of which the Honorable Court ought to take cognizance.

ROBERT C. BACON,
WM. R. WARNER,
PARK H. POLLARD,
By RUFUS E. BROWN,
Attorney General of the State of Vermont, and Solicitor for Defendants.

(Endorsed:) Filed September 17, 1913. Annie M. Brown, Deputy Clerk.

(Further endorsed:) September 20, 1913. For the reasons herein set forth, no objection being made, it is hereby ordered that the prayer of the within petition be granted. J. L. Martin, Judge.

23 No. 29. In Equity.

RUTLAND RAILROAD COMPANY
vs.
ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD, Public Service Commission of the State of Vermont.

Entries on Journal of September 20, 1913.

The petition of Park H. Pollard, by Rufus E. Brown, Attorney General, praying that he, Park H. Pollard, have leave to enter as a defendant in the cause in place of George H. Babbitt, one of the original defendants, considered and ordered that, for the reasons therein set forth, which appear to be true, the prayer of said petition be granted.

The petition of the defendants, Robert C. Bacon, William R. Warner and Park H. Pollard, Public Service Commission, to withdraw the answer filed August 27, 1913, considered, and ordered that the said petition be granted and that the answer be withdrawn.

The petition of Robert C. Bacon, William R. Warner and Park H. Pollard, defendants, for leave to file an amended motion to dismiss, considered and, there being no objection thereto, it is ordered

that the prayer of said petition be granted and that said amendment be filed.

The said amended motion of the defendants to dismiss for want of jurisdiction, which was filed September 17, 1913, considered and ordered that said motion be over-ruled and said defendants ordered to file their answer within five days or a decree pro confesso will be entered, to which said order *of* over-ruling the defendant's motion to dismiss, the defendant seasonably objected and excepted in open court; and, further, the defendants, in order to facilitate the final determination of this cause upon appeal to the Supreme Court of the United States, waived said five days' time in which to
24 file answer and asked that the bill be taken pro confesso as to said defendants on the same day, whereupon a decree pro confesso was entered on said 20th day of September, 1913, and the order then and there duly made; and the said defendants, for the reason aforesaid, also waived the provisions of Rule 17 of the Rules of Practice for the Courts of Equity of the United States and asked that a final decree be made and entered at this time of the same force and effect as if made at the expiration of said five days and of said thirty days from the making and entering of said order, whereupon order was then and there made for final decree to the effect that the order of the Public Service Commission, directing the said Rutland Railroad Company, to make certain changes and do certain work at and near the station of said Rutland Railroad in the City of Vergennes, Vermont, as set forth in the bill of complaint, is confiscatory, unreasonable and unlawful, and would result in taking the property of said Rutland Railroad Company without compensation and without due process of law, in violation of the Constitution of the United States, and that the aforesaid order of said Public Service Commission be stayed, and that said Bacon, Warner and Pollard, constituting the Public Service Commission of the State of Vermont and their successors in office be, and they, and each of them, are enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted, any proceeding or action, civil or criminal, or of any kind whatsoever, for the enforcement of the aforesaid orders of said Public Service Commission, or for or on account of any act, or thing done, suffered or omitted, which may be forbidden or commanded by said order, or for any alleged violation of the aforesaid order of said Public Service Commission by said
25 Rutland Railroad Company, or its successors or assigns, or the officers, agents, or servants of them and each of them, until the further order of this Court; whereupon the defendants seasonably objected and excepted, in open court, to said order so made by the Court.

Petition for an appeal to the Supreme Court of the United States was filed by the defendants, which petition was considered and allowed.

At the same time said defendants filed Assignment of Errors, and, on the same day, the said defendants made oral application for a certificate of the Judge of this Court of the jurisdictional question raised in the proceedings in this cause, as heretofore set forth, which certificate was granted, reduced to writing and filed with the Clerk of this Court.

26 In the District Court of the United States for the District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
vs.
ROBERT C. BACON, WILLIAM E. WARNER, PARK H. POLLARD, Public Service Commission of the State of Vermont.

Final Decree.

This cause came on to be heard at Chambers, at Brattleboro, Vermont, on the 20th day of September, 1913, upon the bill.

And it appearing that the bill in equity in the above entitled cause was filed in this Court on the 21st day of August, 1913, and that a subpœna was issued and duly served on the defendants named in said bill, and that subsequently thereto and prior hereto Park H. Pollard was given leave to be substituted as a party defendant for George H. Babbitt, said Park H. Pollard having become the successor in office of the said George H. Babbitt since the service of said subpœna; and that said defendants filed an amended motion to dismiss said bill, without objection and by leave of Court, and that by order made and entered on this 20th day of September, 1913, the said amended motion to dismiss said bill for want of
27 jurisdiction on the part of the Court was overruled and the defendants ordered to answer within five days or a decree pro confesso would be entered; whereupon the defendants, in order to facilitate the final determination of this cause upon appeal to the Supreme Court of the United States, waived said five days' time in which to answer and asked that the bill be taken pro confesso as to said defendants on the same day; whereupon a decree pro confesso was entered on said 20th day of September, 1913, and the order then and there duly made; and the said defendants, for the reason aforesaid, also waived the provisions of Rule 17 of the Rules of Practice for the Courts of Equity of the United States, and consented that final decree may be made and entered at this time with the same force and effect as if made after the expiration of thirty days from the making and entering of said order taking said bill pro confesso, and no proceedings had been taken by said defendants during said thirty days' period.

Now therefore, upon consideration of the said bill, and it appearing that the allegations thereof are true and among other things, that the order of said Public Service Commission, dated July 24, 1913, and filed with the Clerk of said Commission August 8th, 1913, and set out in said bill ordering said Rutland Railroad Company to make certain changes and do certain work at and near the Station of said Rutland Railroad in the City of Vergennes, Vermont, is confiscatory, arbitrary, unreasonable and unlawful, and would result in taking the property of said Rutland Railroad Company without compensation and without due process of law, in violation

of the Constitution of the United States, and by reason of the aforesaid facts and waivers, it is by the Court upon consideration
28 thereof, ordered, adjudged and decreed, as follows, to wit;

That the aforesaid order of said Public Service Commission is stayed, and that the said Robert C. Bacon, William E. Warner and Park H. Pollard, constituting the Public Service Commission of the State of Vermont, and their successors in office, be, and they, and each of them, are enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted any proceeding or action, civil or criminal, or of any kind whatsoever, for the enforcement of the aforesaid orders of said Public Service Commission, or for or on account of any act, or thing done, suffered or omitted, which may be forbidden or commanded by said order, or for any alleged violation of the aforesaid order of said Public Service Commission by said Rutland Railroad Company, or its successors or assigns, or the officers, agents, or servants of them and each of them, until the further order of this Court.

Dated at Chambers, at Brattleboro, Vermont, September 20th, 1913.

JAMES L. MARTIN,
Judge of the United States District Court for the District of Vermont.

(Endorsed:) Filed September 20, 1913. Frederick S. Platt, Clerk.

29 The District Court of the United States for the District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
v.
ROBERT C. BACON, WILLIAM R. WARNER, and PARK H. POLLARD, Public Service Commissioners of the State of Vermont.

Petition for Appeal to the Supreme Court of the United States.

The above named defendants conceiving themselves aggrieved by the order overruling the defendants' amended motion to dismiss and by the decree made and entered on the 20th day of September, A. D. 1913, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

RUFUS E. BROWN,
Attorney for Defendants.

Dated this 20th day of September A. D. 1913.

The foregoing claim is allowed.
Dated this 20th day of September A. D. 1913.

JAMES L. MARTIN,
District Judge of the United States
for the District of Vermont.

30 The District Court of the United States for the District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
v.
ROBERT C. BACON, WILLIAM R. WARNER, and PARK H. POLLARD,
Public Service Commissioners of the State of Vermont.

Assignment of Errors.

The defendants pray an appeal from the final decree of this court to the Supreme Court of the United States and assign for error:

First. That the Court erred in overruling the defendants' amended motion to dismiss plaintiff's bill.

Second. That the Court erred in sustaining the bill, and entering final decree thereon.

RUFUS E. BROWN,
Attorney for Defendants.

(Endorsed:) Filed September 20, 1913. Annie M. Brown, Deputy Clerk.

31 No. 29. In Equity.

RUTLAND RAILROAD COMPANY
—
ROBERT C. BACON, WILLIAM R. WARNER and PARK H. POLLARD,
Public Service Commissioners of the State of Vermont.

Certificate of Judge that a Question of Jurisdiction is in Issue, under Section 5 of the Act of March 3, 1891.

In this cause, I hereby certify that the order of dismissal of the amended motion of the defendants to dismiss the original bill is based solely on the ground that a Federal question was involved, and that this bill, in my opinion, discloses the infraction of a right arising under or out of the Federal laws or constitution; and that treating the amended motion to dismiss as presenting this question of jurisdiction, and acting also independently of this motion, and on the Court's own motion, the bill is sustained only for the reasons above stated; that is, that the controversy, arising under the laws and

constitution of the United States, there is consequently jurisdiction of the District Court of the United States.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and it is ordered that the same be filed herein and made a part of the record, to be certified and sent up as a part of the proceedings.

This 20th day of September A. D. 1913.

JAMES L. MARTIN,
District Judge of the United States for the District of Vermont.

(Endorsed:) Filed September 20, 1913. Annie M. Brown, Deputy Clerk.

32 *Statement of Parts of Record to be Printed for Use of Supreme Court of the United States.*

The District Court of the United States for the District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
v.
ROBERT C. BACON, WILLIAM R. WARNER and PARK H. POLLARD, Public Service Commissioners of the State of Vermont.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Supreme Court, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record, the following and no other papers or exhibit, to wit:

Plaintiffs' original bill as amended.
Defendants' amended motion to dismiss.
Final Decree.
Motion for appeal and assignment of error.
Certificate of Judge.
Journal entries of Sept. 20, 1913.

Respectfully,

RUFUS E. BROWN,
Solicitor for Appellant.

(Endorsed:) Filed October 4, 1913. Annie M. Brown, Deputy Clerk.

33 The United States District Court for the District of Vermont.

No. 29. In Equity.

RUTLAND RAILROAD COMPANY
vs.
ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD, Public Service Commissioners of the State of Vermont.

Stipulation.

It the above entitled cause, appeal having been taken to the Supreme Court of the United States, it is hereby stipulated by the solicitors for the parties hereto, that in making a transcript of the records the clerk may omit therefrom the following papers and records, to wit:

Defendants' answer.
Defendants' motion to withdraw answer.
Defendants' motion for Park H. Pollard to enter.
Defendants' original motion to dismiss.
Defendants' bond on appeal.

And that the entries on the journal of the Court showing the proceedings on September 20, 1913, shall be included in a transcript of the record with the other papers and records not herein agreed to be omitted.

And that an order may be entered if the same to the Court shall seem proper, in accordance with this stipulation.

Dated this 4th day of October, A. D. 1913.

E. W. LAWRENCE,
Solicitor for Plaintiff.
RUFUS E. BROWN,
Solicitor for Defendant.

October 4, 1913. Ordered as above set forth.
JAMES L. MARTIN, *Judge.*

(Endorsed:) Filed October 4, 1913. Annie M. Brown, Deputy Clerk.

34 UNITED STATES OF AMERICA,
District of Vermont, ss:

I, Frederick S. Platt, Clerk of the District Court of the United States, within and for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 33, inclusive, contain a true and correct transcript of such portions of the record to be incorporated into the transcript on appeal, as were designated by the Solicitor for the Appellant and by the stipulation of the Solicitors for both parties in that behalf; in the cause entitled: Robert C. Bacon, William R. Warner, Park H. Pollard, Public Serv-

ice Commission of the State of Vermont, Appellants, (Defendants below), vs. Rutland Railroad Company, Appellee (Plaintiff below), as the same remain of record and on file in the office of the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Rutland in the District of Vermont, this 13th day of October, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-eighth.

[Seal of the U. S. District Court, Dist. of Vermont.]

FREDERICK S. PLATT, *Clerk*,
By FREDERICK G. SWINNERTON,
Deputy Clerk.

Endorsed on cover: File No. 23,911. Vermont D. C. U. S. Term No. 760. Robert C. Bacon, William R. Warner, and Park H. Pollard, Public Service Commission of the State of Vermont, appellants, vs. Rutland Railroad Company. Filed October 18th, 1913. File No. 23,911.

Supreme Court, U.S.
FILED.
OCT 27 1913
JAMES H. McKENNEY,
Clerk.

7

Supreme Court of the United States.

ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD,
PUBLIC SERVICE COMMISSION OF THE STATE OF VERMONT, Appts.

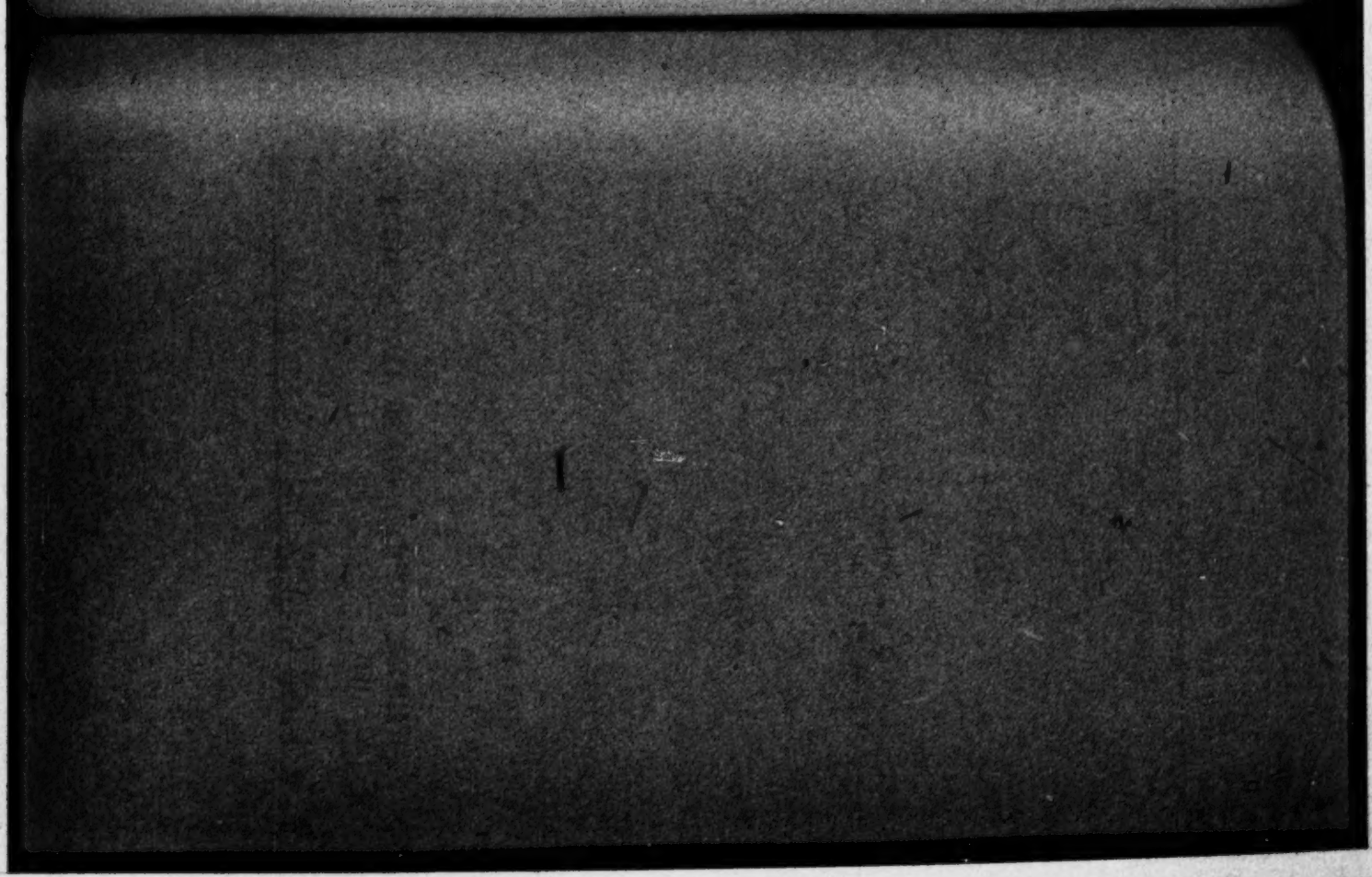
vs.

RUTLAND RAILROAD COMPANY.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

No. 760. October Term, 1913.

MOTION TO ADVANCE.



Supreme Court of the United States.

No. 760 October Term, 1913.

ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD, PUBLIC SERVICE COMMISSION

of the

STATE OF VERMONT, APPTS.

v.

RUTLAND RAILROAD COMPANY.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

MOTION TO ADVANCE.

Robert C. Bacon, William R. Warner, Park H. Pollard, Public Service Commission of the State of Vermont, the appellants in the above entitled cause, by Rufus E. Brown, Attorney General of the State of Vermont, their solicitor, move that this cause be advanced upon the Docket of this Court, to be heard and argued at as early a date as can be fixed, convenient to the Court.

STATEMENT OF THE CASE.

The Rutland Railroad Company is a corporation organized and existing under the laws of the State of Vermont and owns and operates a certain line of railroad extending from Ogdensburg in the State of New York to Bellows Falls in the State of Vermont, and other lines of railroad. Said Rutland Railroad Company maintains in the City of Vergennes, in the State of Vermont, upon said first mentioned line, a passenger and freight station and together with such station owns a tract of land for station purposes and for providing freight facilities, and owns and maintains certain sidetracks and switches. Robert C. Bacon, William R. Warner and Park H. Pollard are all citizens and residents of the State of Vermont, constitute the Public Service Commission of the State of Vermont and the cause at bar was brought against them to have an order made by their predecessors in office decreed to be void and to restrain them and their successors in office in their official capacity from further attempting to enforce said order as hereinafter set forth.

On the eighth day of August, 1913, there was filed with the Clerk of said Public Service Commission an order signed by the then members of the Public Service Commission of Vermont in the matter of the citizens of Vergennes v. Rutland Railroad Company. This order was made on a petition brought by certain citizens of Vergennes against said Rutland Railroad Company in conformity to the laws of Vermont, complaining and alleging that said passenger station at said Vergennes is inadequate and unfitted for said city and located at a point not suitable for the reasonable accommodation of the public, and praying that said Rutland Railroad Company be ordered to erect and maintain a suitable and adequate passenger station at said city. Hearing was had by said Public Service Commission on said petition, at which hearing said citizens of Vergennes and said Rut-

land Railroad Company appeared. From the evidence adduced, and an inspection of the premises in the presence of all parties, said Public Service Commission found the allegations in the petition to be true, and that the passenger station facilities at Vergennes were inadequate and that the public good required that new and better facilities be furnished, and ordered that said Rutland Railroad Company should erect and maintain at said City of Vergennes a new passenger station at a certain location indicated in said order, and further ordered certain other changes in the railroad equipment in connection therewith. Thereafterwards, on the 19th day of August, 1913, said defendant Rutland Railroad Company, brought its bill in equity before the District Court of the United States for the District of Vermont against the plaintiff appellants, the said Bacon, Warner and Pollard, as the Public Service Commission of Vermont, setting forth at length the facts above stated; and averring that the matters in controversy exclusive of interest and costs exceed the sum of three thousand ($3,000) dollars; that the order of said Public Service Commission above set forth is confiscatory, arbitrary and beyond the power of the Commission, and, if enforced, would result in taking the property of said Railroad Company without compensation, and without due process of law and would deny to said Railroad Company equal protection of the laws, in violation of the Constitution of the United States and of the State of Vermont, and praying that said plaintiff appellants as said Public Service Commission, and their successors in office, be permanently enjoined and restrained from instituting hearings for determining any complaint against said railroad company upon said matters set forth in the bill in the cause at bar, or from instituting or prosecuting any proceedings, civil or criminal, before any of the courts of the State of Vermont for the purpose of enforcing said order, and that said order be declared repugnant to the Constitution and laws of the United States and the State of Vermont and

unconstitutional and void as to said Rutland Railroad Company. Thereafterwards, on the 17th day of September, 1913, said plaintiff appellants, filed their amended motion to dismiss said bill in the cause at bar for want of jurisdiction on the part of said District Court of the United States for the District of Vermont, and thereafterwards, on the 20th day of September, 1913, it was ordered by said District Court of the United States for the District of Vermont that said motion be overruled and that said plaintiff appellants, be ordered to file their answer within five days or a decree *pro confesso* would be entered, which said order overruling said motion was seasonably objected and excepted to in open court, and in order to facilitate the final determination upon appeal of the cause at bar, said five days time was waived; whereupon said decree *pro confesso* was entered on said 20th day of September, 1913, and the order thereon was then and there duly made, and said plaintiff appellants, for the reason aforesaid, also waived the provision of Rule 17 of the Rules of Practice for the Courts of Equity for the United States and asked that final decree be made and entered of the same force and effect as if made at the expiration of the said five days, and thirty days from the entering of said order. Whereupon order was then and there made for final decree to the effect that said order of the Public Service Commission is confiscatory, arbitrary, unreasonable and unlawful and would result in taking of property of said Rutland Railroad Company without compensation and without due process of law in violation of the Constitution of the United States and that said Public Service Commission and their successors in office be enjoined and restrained from instituting or prosecuting or causing to be instituted or prosecuted any proceeding or action, civil or criminal, of any kind whatsoever for the enforcement of said order of said Public Service Commission. Whereupon said plaintiff appellants seasonably objected and excepted in open court to said order for final decree so made by the Dis-

trict Court of the United States for the District of Vermont, and thereafterwards on the said 20th day of September, 1913, said plaintiff appellants, conceiving themselves aggrieved by the order overruling their amended motion to dismiss and by the decree made and entered on the 20th day of September, 1913, in the cause at bar, appealed from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, to wit: that the Court erred in overruling the defendants' amended motion to dismiss plaintiff's bill and that the Court erred in sustaining the bill and entering final decree thereon and prayed that an appeal might be allowed and that a transcript of the record of the proceeding and papers upon which said order was made, duly authenticated, might be sent to the Supreme Court of the United States. On said 20th day of September, 1913, said District Court of the United States for the District of Vermont allowed said foregoing claim of appeal in open court and made its certificate under Section 238 of Chapter 10 of the Act of March 3rd, 1913, that a question of the jurisdiction of said District Court of the United States for the District of Vermont is in issue and therein certified said question of jurisdiction to the Supreme Court of the United States for decision, which said certificate was duly made a part of the record in the cause at bar. Thereupon, the case was brought here by said appeal.

REASONS FOR THIS MOTION.

The plaintiff appellants contend that the only question presented by this appeal is the question of the jurisdiction of the District Court of the United States for the District of Vermont to review and enjoin the acts of the Public Service Commission of the State of Vermont; that said question is one of vital importance to the State, to the Public Service Commission and to their successors in office; that the due

course of administration of the law in Vermont requires that it be advanced and disposed of at the earliest reasonable time and that the time of calling a special session of the Legislature of said State may be dependent upon the disposition of this cause.

It is further represented that various matters now pending before said Public Service Commission and in which the State of Vermont is vitally interested will be affected by the final disposition of the cause at bar and that the proper investigation, regulation and control of public utility corporations by the State of Vermont and other special and peculiar conditions require an early disposition of this cause all of which are more fully set forth in the affidavit of Allen M. Fletcher, Governor of Vermont, and of said Bacon, Warner and Pollard, which are hereto annexed and made a part of this motion.

Herbert G Barber
Robert C Bacon

Attorney General of the State of Vermont and Solicitor for said Bacon, Warner and Pollard.

AFFIDAVIT OF ALLEN M. FLETCHER,

GOVERNOR OF VERMONT.

The deponent, Allen M. Fletcher of Cavendish, Windsor County, Vermont, respectfully represents that he is Governor of the State of Vermont; that the Public Service Commission of said State consists of Robert C. Bacon, William R. Warner, Park H. Pollard, who are defendants in the cause now before this Honorable Court; that the deponent as Governor of the State of Vermont, now has under consideration, the matter of calling a special session of the legislature of the State of

Vermont, for the consideration of a number of matters of state-wide importance and a possible enactment of legislation concerning the same; that the act creating the Public Service Commission of Vermont and defining its jurisdiction and powers, is among the most important of said matters; that the matter of said Public Service Commission, said act creating the same and the subject matter of this suit and the jurisdiction of the United States District Court for the District of Vermont, in relation thereto, are matters of universal state interest and of state-wide discussion by the citizens, press and members of the legislature; that the deponent is of the belief that if the contention of the orator in the cause now before this Honorable Court be sustained, that the jurisdiction and powers of the Public Service Commission of the State of Vermont will be seriously curtailed and that a radical change in said act creating said Public Service Commission will be imperative; that the deponent is of the belief that the policy of the State of Vermont requires that legislation relating to said act creating the Public Service Commission of the State of Vermont, should be considered by the legislature of Vermont, in connection with and in the light of a decision of your Honorable Court relating to the matters and things involved in the cause now before this Honorable Court and that consideration of said legislation by the legislature should be deferred pending said decision; that there are a number of other matters of state-wide importance which will come before any special session of the legislature that may be called and that this deponent is deferring the consideration of the matter of calling said special session pending the decision of this Honorable Court.

This deponent has read the affidavit of said Bacon, Warner and Pollard filed in this cause and subscribes to and makes the matters and things therein contained, a part of this affidavit.

ALLEN M. FLETCHER.

State of Vermont, } At Montpelier in said County
Washington County. } on this 10th day of October, 1913, personally appeared Allen M. Fletcher and made oath that he has read the foregoing affidavit by him subscribed and knows the contents thereof; and that the same is true of his personal knowledge except those matters stated to be upon information and belief and that as to such matters he believes them to be true.

Before me,
K. G. DUNLEVY,
Notary Public.

[Seal.]

AFFIDAVIT OF ROBERT C. BACON, WILLIAM R. WARNER AND PARK H. POLLARD.

Robert C. Bacon, William R. Warner and Park H. Pollard, each being first duly sworn, depose and say, that they are the Public Service Commissioners, of the State of Vermont and are the defendants in the above entitled cause; that said Bacon and said Pollard are successors in office to Charles D. Watson and George H. Babbitt respectively, who signed and issued the order on which said cause is predicated; that there is at present pending in the State of Vermont before said Public Service Commission, at least eight proceedings to compel railroad corporations to separate highway crossings at grade; that each and every of said cases involves sums exceeding three thousand dollars ($3,000.00) and presents questions of Federal constitutional rights of the railroad companies identical with those presented by the orators bill in said cause; that cases of similar nature and involving like sums are constantly coming before said Commission; that there is now pending before said Commission upon complaint

of said State of Vermont, a proceeding in which the rates of all telephone companies operating within the State of Vermont, are being investigated and in which it is claimed in behalf of the State that said rates are unreasonable and excessive and should be reduced; that the amount involved in said case exceeds the sum of three thousand dollars ($3,000.00); that said Commission is informed and believes and therefore avers on such information and belief, that if certain of the orders to be made in said various proceedings should be adverse to the corporations involved, that such recourse would be had in the District Court of the United States for the District of Vermont; as would involve among others the precise questions pending in the above entitled cause; that there is now pending before said Public Service Commission, a proceeding regarding a grade crossing and a railroad station in the Town of Brattleboro, Vermont, in which if the order made by said Commission is questioned before the District Court of the United States for the District of Vermont, precisely the same questions will be involved as are raised in this cause; that there are now pending in the State Courts of Vermont, proceedings to compel the building of a depot and the elimination of certain grade crossings at White River Junction, Vermont, which proceedings are liable to be returned to said Commission for further action, and if so, identically the same questions which are involved in this cause, may and probably will, be raised; that the law creating and constituting the Public Service Commission of the State of Vermont and defining its jurisdiction and powers is under state-wide discussion at the present time among the citizens of Vermont and especially among the members of the present legislature of the State of Vermont; that these deponents are informed and believe and therefore on such information and belief aver, that the Governor of the State of Vermont, may in the near future, call a special session of the legislature of the State for the purpose of considering a number of different subjects of state-wide importance and

enacting needed laws regarding the same; that among the subjects above referred to, one of the most important is legislation in amendment and alteration of the act creating the Public Service Commission of the State of Vermont and defining its jurisdiction and powers; that the nature of such amendments and alterations, will in a large measure, depend upon the final determination by this Honorable Court of the question involved in the above entitled cause and more particularly upon the decision of the question of the jurisdiction of the District Court of the United States for the District of Vermont of said Public Service Commission and its orders and acts similar to those involved in said cause.

All these matters and things are of state-wide interest and are being generally discussed among the people of Vermont and especially among the members of the present legislature of the State and the action of the legislature in regard to the Public Service Commission law, must and will largely depend upon the decision in this cause.

All the matters and things involved in this cause relate directly to a Board of Public Officials created by the laws of the State, and acting in behalf of the State and relate to their acts performed and done in their officials capacity.

ROBERT C. BACON,
WILLIAM R. WARNER,
PARK H. POLLARD.

State of Vermont, } At Montpelier in said County,
Washington County. } on this 10th day of October, 1913, personally appeared Robert C. Bacon, William R. Warner and Park H. Pollard and severally made oath that they read the foregoing affidavit by them subscribed, know the contents thereof and that the same is true of their own knowledge except those matters that are alleged to be upon information and belief and that as to those matters they believe them to be true.

Before me,
K. G. DUNLEVY,
Notary Public.

[Seal.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 760.

ROBERT C. BACON, WILLIAM R. WARNER, PARK H. POLLARD, PUBLIC SERVICE COMMISSION OF THE STATE OF VERMONT, APPELLANTS,

vs.

RUTLAND RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLANTS.

Short Point.

Apart from the question arising upon the motion to dismiss, which is still before the court, this appeal presents for consideration on the merits the single question as to whether, in view of the opinion of this court expressed in Prentis *vs.* Atlantic Coast Line Company (211 U. S., 210 *et seq.*), the bill of complaint herein should not have been

dismissed by the District Court of the United States for the District of Vermont as having been prematurely brought.

The question so stated assumes as matter of course that the District Court of the United States for the District of Vermont is possessed in proper cases of jurisdictional power to stay and enjoin orders of the Public Service Commission of the State of Vermont, and this, notwithstanding the provisions of section 720 of the Revised Statutes of the United States and of sections 4597, 4598, 4599, and 4600 of the Public Statutes of Vermont, 1906, which latter declare that—

> "SEC. 4597. Said commission shall have the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts of law and equity in this State. It shall have an official seal on which shall be the words, 'State of Vermont, Public Service Commission. Official Seal.'
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> "SEC. 4598. The forms, pleadings, procedure and rules of practice before said commission shall be prescribed by said commission and printed for general use. Said commission shall hear all matters and state its rulings when excepted to and its findings of facts, which shall have the force and effect of the reports of special masters in courts of equity, whenever the cause is taken by an appeal to the supreme court."

"SEC. 4599. Any party to a cause who feels himself aggrieved by the final order, judgment or decree of said commission shall have the right to take the cause to the supreme court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees, on the facts found and reported by said commission."

"SEC. 4600. Appeals from said commission shall be taken and the cause entered in the supreme court in the county where the cause arises, in the manner and under the law and rules of procedure which govern such appeals from the court of chancery. The supreme court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of said commission, and may remand a cause to said commission with such mandates as law or equity shall require; and said commission shall enter judgment, order or decree in accordance with such mandates. Such appeal shall not vacate any judgment, order or decree of said commission, but the supreme court or, when not in session, a judge thereof, may suspend execution of the same as justice and equity require, unless otherwise specifically provided by law."

The assumption as to the possible existence of such power in the Federal District Court is based upon what may be understood to be the effect of the opinion of the Supreme Court of Vermont in the case of *Sabre et al. vs. Rutland Railroad Company et al.*, 86 Vermont, 347, wherein, the constitu-

tionality of the above sections of the Public Statutes of Vermont being under discussion, it was said:

> (P. 361:) "We consider that under the Law of 1906, the Railroad Commission, now legally known as the Public Service Commission, by virtue of the Act of 1908, is an administrative body clothed in some respects with functions of a judicial nature, quasi-judicial functions they may be called, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience, and to determine facts upon which existing laws shall operate. In a sense it has auxiliary, or subordinate, legislative powers; for while the supreme legislative power cannot be delegated there are many powers so far legislative that they may properly be exercised by the Legislature, which may, nevertheless, be delegated. The law in its general features is not open to the objection that it conflicts with the provision of our Constitution as to the distribution of the powers of government. The functions of an administrative officer, or body, may be to a large extent judicial and regulative in character."
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> * * * * * * *
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> (P. 363:) "In the case of the *Central Vermont Railroad Co. vs. The Public Service Commission*, 189 Fed., 683, it was held by the Circuit Court of the United States for the District of Vermont, after a discussion of our statute and the decisions construing and applying it, that our commission is not 'a court,' and that this Court

had carefully preserved all of the rights of parties, in such a proceeding, as this, had protected them to the fullest extent, and quotations from our opinions were made showing the reasonable view which this Court had taken in putting its construction upon the powers of the commission in respect to supervision and regulation.

"The Public Service Commission is not in the strict sense a court, though like many administrative bodies it may exercise quasi-judicial functions, but it is a governmental agency provided for the administration, in respect to certain specific matters of what in a broad, though true, sense may be called the police power."

(P. 364:) "Power to provide for the public safety and convenience stands upon the same ground as the power to protect the public health and the public morals."

* * * * * * *

"It is indeed beyond the power of a State to divest itself of its right and duty in respect to the full exercise of this power, and the Federal Government cannot interfere with a State in the exercise of that right and duty except by virtue of some authority derived from the Constitution of the United States."

* * * * * * *

(P. 365:) "The efficient exercise of the police power inherent in the people of this State is not to be frittered away by overnice speculations upon the distribution of the powers of government. Our Constitution makes a general distribution of powers, but does not descend to those details which are found in some constitutions and which

have resulted in discussions calculated to debilitate government itself."

* * * * * * *

(P. 366:) "But where a board, as the Board of Health, or the Board of Railroad Commissioners, has conferred upon it the power to make rules and regulations in furtherance of the police power, the statute is interpreted as though it conferred only the power to make reasonable regulations, and so the legislative act becomes complete, and the question of whether the rules and regulations presented are reasonable, or are unreasonable and arbitrary, is a strictly judicial one of which the courts must take cognizance whether the statute provides for proceedings in that regard or not."

Statement of the Case.

This is an appeal direct from the District Court of the United States for the District of Vermont, taken under the provisions of section 5 of the act of Congress of March 3, 1891, ch. 517 (26 Stats. L., 826), reproduced in section 238 of the Judicial Code (36 Stats. L., 1157), which provide that such appeals may be taken—

"(1) In any case in which the jurisdiction of the (district) court is in issue," in which cases the question of jurisdiction alone shall be certified to the Supreme Court for decision, and

"(2) In any case that involves the construction or application of the Constitution of the United States."

Appellants, composing the Public Service Commission of the State of Vermont, seek the reversal of the final decree of said District Court, which stayed and enjoined the enforcement of a certain order issued by the Commission in the supposed orderly execution of its powers and duty, whereby the Rutland Railway Company, a corporation organized and existing under and by virtue of the laws of Vermont and subject, by the terms of such laws, to the jurisdictional power and supervisory regulation and control of said Commission, was ordered, in the interest of "public convenience, safety and accommodation" (R., 6), to erect and maintain, on or before January 1, 1914, at Vergennes, Vermont, on the line of its railroad, a certain new or remodeled passenger station or depot, the Commission, after public hearing, at which said Railroad Company was represented by counsel and evidence was taken, having first found as a fact "that the present passenger station facilities are inadequate and that the public good requires that new or better facilities be furnished" (R., 6).

Notwithstanding the provisions of section 4469 of the Public Statutes of Vermont, which require railroad corporations to "establish and maintain depots or station houses, with suitable accommodations, at such points on their roads as the Public Service Commission shall, on petition, adjudge to be necessary for the reasonable accommodation of the public," and of section 4611, which confer

upon said Commission jurisdiction in all matters respecting—

> "III. The location, sufficiency, and maintenance of proper depots or stations," and
> "IX. The manner of operating railroads and conducting the business thereof so as to be reasonable and expedient and to promote the security, convenience, and accommodation of the public."

and the provisions of sections 4597 and 4599, above quoted, which declare that "the Commission shall have the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction," and that "any party to a cause who feels himself aggrieved by the final order * * * of said Commission shall have the right to take the cause to the Supreme Court for the correction of errors in the form or substance of such orders, the Rutland Railroad Company, not availing itself of such right of appeal, but ignoring the same, and even before the time limited for the noting of such appeal had expired, filed its bill of complaint in the District Court of the United States for the District of Vermont to restrain and enjoin the enforcement of the order here complained of.

THE PLEADINGS.

Complainant, Rutland Railroad Company, by its bill of complaint averred that all parties to the proceedings were citizens of the State of Vermont; that complainant as a common carrier owned and operated certain specified lines of interstate railroad over which it engaged in the business of transporting passengers and freight, and that in the city of Vergennes (in the State of Vermont) it maintained and operated a passenger and freight station and certain other lands for station purposes and freight facilities (R., 1). It carefully and in great detail described the station buildings and the accommodations provided therein and thereby for the traveling public; the position of said buildings with respect to their surroundings and the means of access thereto, and averred that such "had been the location of said passenger station (and freight house) ever since the railroad * * * was built prior to 1850" (R., 2, 3). It further described in detail certain track and warehouse construction which latterly had been made, and certain other alterations and improvements in the station surroundings which it had under contemplation. It detailed the number of the passenger train movements daily and Sunday through Vergennes; the average number of passengers, declared not to exceed 70 per day, entraining at said station, and declared that the popu-

lation of Vergennes was 1,483 persons, which number was less than it was in 1900 and prior thereto (R., 4).

It declared that on the 8th day of August, 1913, the Public Service Commission (named as defendants, appellants here) had filed with its clerk a report and order (which it recited in full, R., pp. 5-7), from which it appeared that as the result of a petition brought by the president of the Board of Trade of Vergennes "and about eighty others, citizens of Vergennes, against the Rutland Railroad Company alleging that the passenger station of the defendant at that place is inadequate and unfitted for the city of Vergennes and is in many ways an inconvenience to the traveling public" and praying that defendant be required "to erect and maintain a suitable passenger depot or station at one of" two indicated locations; that due notice of the filing of said petition had been given and hearings had been held on May 1 and July 22, 1913, at which hearings defendant was represented by counsel and evidence had been taken; that upon "consideration of the evidence and our (the Commission's) personal observation and examinations of the localities of the present station and the proposed new locations, and of conditions at the present station" (R., 5), the Commission found "the allegations of the petition to be true; that the present passenger station facilities are inadequate and that the public good requires that new or better facilities be furnished"; that "this

object can be reasonably accomplished by moving the present station, repairing and enlarging it, by moving the present freight house, water standpipe" and certain other accessories, and "by constructing proper platforms, coverings or awnings, sidewalks and (making) other necessary changes," and had concluded "that the necessities of the case and public convenience, safety and accommodation" so required. The defendant, Rutland Railroad Company, was accordingly ordered to erect and maintain at Vergennes on the line of its railroad, a passenger station at a specified point, "either by erecting an entirely new station according to an indicated plan or by utilizing the present depot," by moving it to the indicated point and enlarging and otherwise adding to its facilities for accommodation; the existing freight house to be likewise moved "to a convenient point north of the newly located passenger station," and "obvious and necessary changes" in station sidewalks and platforms to be made; all of the prescribed work to be completed on or before January 1, 1914, subject to the approval of the Commission (R., 6, 7).

It is further averred by the bill that the railroad company contended before the Commission that the changes so ordered "involved wholly unnecessary and unreasonable expense"; would impose upon the company undesirable and unreasonable operating conditions; and that the Commission lacked authority to carry either of the contem-

plated plans into effect (R., 7); that the existing passenger station and facilities "are reasonably adequate and convenient for the traveling public, and that the point at which said passenger station is now located, and has been located for more than 60 years, reasonably accommodates the public"; that increased expenditures made necessary by unusual floods and by taxes and operating expenses indicated that the company would "have a deficit as the result of its operations for the year 1913, without declaration of any dividends upon its stock," and that it was "prudent and necessary in the safe conduct of" the company's "business to spend as much money as it has available upon maintenance of its road-bed and rolling stock, and that it is imprudent and unwise to expend its money in improvement of passenger stations and passenger grounds which are now reasonably safe and adequate" (R., 8).

Further averring that for such reasons the order complained of is "confiscatory, arbitrary and beyond the power of the Commission, and if enforced will result in taking property of (the company) without compensation and without due process of law, and in denying to (the company) equal protection of the law, in violation of the Constitution of the United States" (R., 8, 9), the railroad company prayed relief by injunction *pendente lite* and permanent, to restrain and prohibit the Public Service Commission from instituting or prosecuting or causing to be instituted or prose-

cuted any action or proceeding, civil or criminal, against the company or its directors or agents for the enforcement of said order, and prayed that said order might be declared to be unconstitutional and void (R., 10, 11).

Responding to this bill of complaint, the Public Service Commission moved to dismiss the same (demurrers and pleas in equity causes having been abolished by the rules of practice for the courts of equity of the United States—see rule 29) because—

1. The District Court had no jurisdiction of the parties or the subject matter of the cause; and

2. "Because by sections 4599 and 4600 of the Public Statutes of Vermont as amended by Nos. 108 and 116 of the acts of 1908, any party to a cause who feels himself aggrieved by the final order, judgment or decree of the said Public Service Commission has a right to take the cause to the Supreme Court of Vermont by appeal for the correction of any errors excepted to in its proceedings or in the form or substance of its orders, judgments or decrees, on the facts found and reported by said Commission." * * * The time for entering such appeal had not expired at the time of bringing the bill of complaint in this cause; * * * and upon the taking of such an appeal the order of the Commission by the terms of the statute would be suspended and so remain during its pendency. "Yet the plaintiff had not at the

time of bringing said bill nor has it since availed itself of said right to appeal; therefore until such appeal is taken and final judgment, order or decree made in the cause the plaintiff has no complaint of which the Honorable Court ought to take cognizance" (R., pp. 12-13).

This motion to dismiss having been considered and overruled by the court (R., 14) and answer ordered to be filed within five days, the respondent, the Public Service Commission, "in open court" submitted to decrees *pro confesso*, and final, the latter declaring that the order of the Commission complained of in the bill of complaint was "confiscatory, arbitrary, unreasonable and unlawful, and would result in taking the property of the said Rutland Railroad Company without compensation and without due process of law, in violation of the Constitution of the United States" (R., 15), and injunction against the Commission granting the full measure of relief as prayed by the bill was ordered to issue.

To review this final decree because of errors, as assigned, in the overruling of the Commission's motion to dismiss the bill of complaint, and in the sustaining of said bill and entering final decree thereon (R., 17), this appeal was duly prayed (R., 16) and allowed by the learned district judge (R., 17).

ASSIGNMENT OF ERROR.

The District Court of the United States for the District of Vermont erred in not dismissing the bill of complaint herein—

1. For want of jurisdiction in equity to grant the relief prayed.

2. Because said bill of complaint was prematurely brought.

PERTINENT SECTIONS OF PUBLIC STATUTES OF VERMONT, 1906.

RAILROADS—TITLE 26.

CHAPTER 188.

GENERAL PROVISIONS.

SEC. 4325. RAILROAD CORPORATIONS SUBJECT TO THIS TITLE.—Railroad corporations organized or incorporated under the laws of this State shall be subject to the provisions of this title so far as consistent with their respective charters.

SEC. 4334. LEGISLATIVE CONTROL.—The provisions of this title shall at all times be subject to alteration, amendment or repeal by the general assembly.

Chapter 191.

Construction and Operation of the Road.

Maintenances of Stations.

Sec. 4469. Location of depots; petition to Public Service Commission.—Railroad corporations shall establish and maintain depots or station houses, with suitable accommodations, at such points on their roads as the Public Service Commission shall, on petition, adjudge to be necessary for the reasonable accommodation of the public. Such petition shall be signed by ten or more freeholders of the vicinity where the proposed depot is to be located, and shall be duly served upon the corporation, and a hearing thereon given. On such order, said commission shall specify the place, the kind of depot or station to be built and maintained and fix the time in which the order therefor shall be complied with.

Chapter 196.

Public Service Commission.

Sec. 4591. Constitution of commission.—A commission of three persons consisting of a chairman and two associates, who shall be appointed by the governor with the advice and consent of the

senate, shall constitute a Public Service Commission. The commissioners first appointed shall hold office for two, four, and six years respectively from and including the first day of December, nineteen hundred and six.

SEC. 4596. QUORUM; MEETINGS.—Two of said commissioners shall constitute a quorum for the transaction of any business or duties of said commission; and meetings of said commission may be held at any time or place within the State upon call of any member of said commission and after a reasonable notice by mail or telegraph to the other members, and shall be held at such times and places as, in the judgment of said commission, will best serve the convenience of all parties in interest. All original processes or notices issued by said commission shall state the time and place of return.

SEC. 4597. COMMISSION TO BE COURT OF RECORD; SEAL.—Said commission shall have the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts of law and equity in this State. It shall have an official seal on which shall be the words, "State of Vermont. Public Service Commission. Official Seal."

SEC. 4598. PLEADINGS; FINDINGS OF FACTS.—The forms, pleadings, procedure, and rules of practice before said commission shall be prescribed by said commission and printed for general use. Said commission shall hear all matters and state its rulings when excepted to and its findings of facts, which shall have the force and effect of the reports of special masters in courts of equity, whenever the cause is taken by an appeal to the Supreme Court.

SEC. 4599. APPEALS.—Any party to a cause who feels himself aggrieved by the final order, judgment or decree of said commission shall have the right to take the cause to the Supreme Court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees, on the facts found and reported by said commission.

SEC. 4600. SAME; ENTRY; POWERS OF SUPREME COURT.—Appeals from said commission shall be taken and the cause entered in the Supreme Court in the county where the cause arises, in the manner and under the law and rules of procedure which govern such appeals from the court of chancery. The Supreme Court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of said commission, and may remand a cause to said commission with such man-

dates as law or equity shall require; and said commission shall enter judgment, order or decree in accordance with such mandates. Such appeal shall not vacate any judgment, order or decree of said commission, but the Supreme Court or, when not in session, a judge thereof, may suspend execution of the same as justice and equity require, unless otherwise specifically provided by law.

SEC. 4601. COSTS.—The laws regarding the security for and recovery of costs in all cases, except inquiries into the cause of accidents or investigations regarding the public safety or convenience, shall be the same as in the court of chancery, and appeals therefrom, unless otherwise specifically provided by law.

SEC. 4602. SUPERVISION OF RAILROADS; EXAMINATION.—Said commission shall have general supervision of all railroads within this State, whether operated by steam, electricity or any other power, and of the corporations, receivers, trustees, directors, lessees and other persons owning or operating the same, so far as may be necessary to enable it to perform the duties and exercise the powers conferred upon it. It shall, at least once annually, examine the roadbed, bridges, depots, rolling stock and equipment of every railroad in the State, and shall, by examinations and investigations, keep itself informed as to the condition, manner of oper-

ation and safety of all railroads, and shall see that they comply with the provisions of their charters and the laws of this State.

SEC. 4610. UNLAWFUL ACTS OF CORPORATIONS; PETITIONS TO COMMISSION; HEARING.—A person or corporation that claims to be injured by the unlawful action or neglect of those in the operation or management of a railroad in this State in a matter over which said commission is given jurisdiction, may commence proceedings thereon by petition to said commission, therein setting forth briefly his cause of complaint; or the State's attorney of the county in which the matter arises, or any ten freeholders of such county, may, by such complaint, bring before said commission any such matter wherein and whereby they claim the public safety is endangered or the charter or the statute law regulating railroads is being violated. Said commission, when it has information that those operating any railroad in this State are doing so in violation of its charter or of the statute law, shall call the same to the attention of the attorney general, or the State's attorney of the county where the matter arises. The attorney general or the State's attorney shall inquire into the same; and, if in his judgment the matter should be investigated, he shall bring the same before said commission by proper complaint. On receipt of such complaint, said commission shall summon the person or persons complained of to appear before it and

to make answer thereto. If issue is taken to the facts set out in the complaint, said commission shall appoint a time and place for hearing the same in the county where the matter arises, and shall then and there hear and determine the matter complained of.

SEC. 4611. SUMMONS; JURISDICTION OF COMMISSION.—All summons issued by said commission for any party to appear and answer an original petition or complaint pending before said commission, shall be served as writs of summons and at least twelve days before the return day thereof. Said commission shall have jurisdiction on due notice to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter of any railroad corporation, or in the statutes of this State relating to railroads, and shall have like jurisdiction in all matters respecting:

I. The crossing of one railroad by another.

II. All highway grade crossings and signs, signals, gates or flagmen at the same.

III. The location, sufficiency and maintenance of proper depots or stations.

IV. The construction and maintenance of proper fences, cattle guards and farm crossings.

V. The maintenance of the tracks, frogs, switches, gates, signals, culverts, bridges and other structures of wood or iron over openings, and rolling stock and equipment so as to accommodate the

public and be operated with safety and in compliance with law.

VI. The connections, time and times of connections between connecting roads for the accommodation of the traveling public and the transportation of merchandise.

VII. The issue of stock, mortgage bonds or the issue of other securities in order to prevent overcapitalization.

VIII. Tolls and rates when unreasonable or in violation of law.

IX. The manner of operating railroads and conducting the business thereof so as to be reasonable and expedient and to promote the security, convenience and accommodation of the public and to prevent violations of law and unjust discriminations, usurpation or extortions.

X. The organization of railroad corporations by voluntary association.

Provided that nothing in this section shall be construed as affecting special provisions of law relating to anything herein contained.

SEC. 4612. COMMENCEMENT OF PROCEEDINGS.—Proceedings under the preceding section may be commenced by the initial act of said commission, by petition of the attorney general, by petition of the State's attorney of the county, by petition of ten or more freeholders of the State, or in such way as the law may otherwise specifically provide.

JURISDICTION.

As this case, as presented by the bill of complaint, sets up a right under the 14th article of the amendments to the Constitution of the United States in opposition to an alleged threatened deprivation of property under color of state law, there can be no doubt of the jurisdiction in the premises of the District Court as a Federal court.

As the decree of the District Court involved the application of the Constitution of the United States in the circumstances disclosed by the pleadings, it would seem that the jurisdiction of this court to entertain appellate proceedings on direct appeal to it under paragraph 4 of section 5 of the act of March 3, 1891 (26 Stats. L., 827), as substantially reproduced in the Judicial Code, section 238 (36 Stats. L., 1157) is equally free from doubt.

Prentis *vs.* Atlantic Coast Line, 211 U. S., 210.

Western Union Tel. Co. *vs.* Richmond, 224 U. S., 160.

The fact that the appeal herein is accompanied by a certificate concerning the question of jurisdiction in the District Court is of no consequence, for not only was such a certificate not required by the statute to be filed herein, but it also appears from the certificate itself that the character of the jurisdictional question intended to be presented

thereby pertained not to the power of the District Court as a Federal court, but only to its capacity to grant relief in the circumstances.

As the jurisdiction of the District Court in the present case attached solely by reason of the right or exemption under the Constitution of the United States expressly set up in the bill of complaint, the application of which right or exemption in the circumstances was expressly called in question by the motion to dismiss, the right of direct appeal to this court by the party aggrieved by the decree entered, would seem to have been expressly provided for, and that, too, without restrictions, by the statutes above cited, the case being one involving the "application of the Constitution of the United States."

THE MOTION TO DISMISS.

Appellee has moved to dismiss the appeal because not "final." Without adverting to so much of appellee's statement of circumstances attending the entry of this decree as is *dehors* the record and hence not open to the consideration of the court, we venture to think that the motion is without substantial basis, neither the record nor the form of the decree itself affording it any real support.

Our thought and views on this point are fully set forth at pages 2, 3 and 4 of our "Brief in Opposition to the Motion to Dismiss" heretofore

filed in this cause, to which, with the view of avoiding repetition herein, we respectfully invite attention.

ON THE MERITS.

Without attempting to differentiate in the constitutional sense between the powers and duties of administrative bodies engaged in the regulation of common carriers, when establishing a tariff of rates for the future, and when condemning in the interest of the public safety and convenience existing facilities and requiring the installation of improved or additional accommodation, we submit with confidence that the principles of decision expounded in Prentis *vs.* Atlantic Coast Line Company, 211 U. S., 210, are not only applicable to, but should control the disposition of this case. Viewed in the light of such principles it would seem that the motion to dismiss the bill of complaint interposed by the Public Service Commission of Vermont in the District Court was well conceived and should have been granted.

Upon the case here presented, as in the case cited, it may be assumed that the order complained of confiscates complainant's property and infringes the Fourteenth Amendment, if that be open to inquiry.

In Vermont the Public Service Commission is established and its powers are defined at length

by the public statutes of the State, while in Virginia the State Corporation Commission was established and its powers are defined by the constitution of the State. It may be assumed for some purposes that both commissions are "courts" within the meaning of Revised Statutes of the United States, section 720,—but whether in the commonly accepted sense of that word does not matter.

The statutory powers of the Vermont commission with respect to the establishment and maintenance by railroad companies doing business in that State of public transportation service facilities and conveniences, are at least equal to those conferred upon the Virginia commission. In both States orders affecting the transportation companies are to be preceded by notice, hearings and the taking of evidence, if any be offered, and in both an appeal to the supreme judicial tribunal of the respective States is given to any party aggrieved, upon specified conditions neither onerous nor unreasonable. Upon the consideration of any such appeal, the supreme judicial tribunal interested has power to reverse the order complained of and to substitute in its place such order as in its opinion the Commission should have made, and in both States the Commission is required to certify the facts upon which its action is based, while in the case of Vermont such findings of facts are declared to have the force and

effect of the reports of special masters in the courts of equity. In any case the supreme judicial tribunals of the respective States have substantially the same powers over appeals from orders of the Commission as it has over appeals from subordinate courts of the respective States.

It may be assumed, as was assumed in the Prentis case, that when a State by appropriate legislation "sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned," and it would seem to be unnecessary in the present case to determine whether the appellants here when making the order complained of by the appellee were exercising legislative or judicial powers.

In the case at bar, as in the Prentis case, the aggrieved party was possessed of the uncontradicted and undeniable right of appeal and in the instant case, as was ruled in the Prentis case, that right should have been availed of by the aggrieved corporation "so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule" before resort was had to the Federal District Court to tie the hands and cripple the powers of the State Commission.

Paraphrasing a striking paragraph of the opinion of the Court found in the Prentis case at page 230, it may be said that:

The State of Vermont, as well as the State of Virginia, has endeavored to impose the highest safeguards possible upon the exercise of the great power given to its Public Service Commission, not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valuable constitutional rights, if the railroad see fit to appeal. It would seem to be only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action will not respect what they think their rights to be before resorting to the courts of the United States.

The views of this Court with respect to the "equitable fitness or propriety" of public service corporations in general refusing to pursue the course of conduct marked out for them by the laws of States through which they operate, had been made known long prior to the initiation of the proceedings which eventuated in the order complained of in the case at bar. Being generally applicable may they not be supposed to rest with somewhat added weight upon those public service corporations which owe their very existence and right to be and do, to the State whose rule of con-

duct, as prescribed in applicable statutes, they seek to ignore or at least to set at naught? Of this latter class the appellee is one.

It is respectfully submitted that the decree of the District Court for the District of Vermont, herein complained of should be reversed and the case remanded to that court with instructions to dismiss the bill of complaint.

FREDERIC D. MCKENNEY,
J. SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Appellants.

ROBERT C. BACON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 760.

ROBERT C. BACON ET AL., PUBLIC SERVICE COMMISSIONERS OF THE STATE OF VERMONT, APPELLANTS,

vs.

RUTLAND RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS.

I.

The attention of this Honorable Court is respectfully invited to the fact that on motion of Appellants and by order of the Court, passed herein on November 3, 1913, this cause has been advanced and assigned for argument on the first Monday of January next.

In view of this fact it is respectfully submitted that the motion to dismiss should be postponed to the hearing on the merits.

II.

The motion to dismiss is based upon the single ground that "the decree of the District Court for the District of Vermont" (being the decree herein appealed from) "is not a final decree," the objection being leveled at the form in which the decree is drawn, the particular criticism being that because the Public Service Commissioners, appellants here, "are enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted, any proceeding or action, civil or criminal, or of any kind whatsoever for the enforcement" of the order of the Commission complained of in the bill of complaint, "UNTIL THE FURTHER ORDER OF THE COURT," the decree is interlocutory merely and not final.

This criticism lacks substance. It is the settled rule of the Federal courts that decrees which settle the rights of the parties as involved in the pleadings are final, notwithstanding they may give leave to either party to apply at the foot "in relation to any matter not finally determined by it."

French *vs.* Shoemaker, 12 Wallace, 86.

And even though they reserve certain of the questions arising upon the pleadings "for further consideration."

St. Louis, I. M. & S. R. Co. *vs.* Southern Express Co., 108 U. S., 24.

Bank of Lewisburg *vs.* Sheffey, 140 U. S., 445.

The appellee here, the Rutland Railroad Company, complained of a certain order passed by the appellants, composing the Public Service Commission of Vermont, respecting the company's station accommodations and certain of its operations at Vergennes, Vermont. The prayers of the bill of complaint are:

(1) that the Public Service Commission of the State of Vermont be enjoined "from instituting or prosecuting, or

causing to be instituted or prosecuted, any action or proceeding, civil or criminal," against the Rutland Railroad Company, "for or on account of any act or thing done, suffered or omitted" by it with respect to the order of the Commission which is the subject of complaint;

(2) that "on final hearing," the order of the Commission in question "be declared repugnant to the Constitution and laws of the United States;

(3) that the injunction prayed for by complainant be made permanent; and

(4) for general relief (R., 10-11).

The decree passed by the District Court and here appealed from is denominated on the record as a "Final Decree" (R., 15). It recites that "in order to facilitate the final determination of this cause upon appeal to the Supreme Court of the United States" defendants waived time to answer, submitted to an order *pro confesso* and "for the reasons aforesaid, also waived the provisions of Rule 17 of the Rules of Practice for the Courts of Equity of the United States, and consented that FINAL DECREE may be made and entered at this time with the same force and effect as if made after the expiration of thirty days," &c., &c. (R., 15), and so accords in precise terms the very relief prayed in and by the bill of complaint (R., 15-16).

In the event of affirmance by this Court, the court below will have nothing to do but to execute the decree which it has already entered.

Bostwick *vs.* Brinkerhoff, 106 U. S., 3.
Mower *vs.* Fletcher, 114 U. S., 127.

The Journal Entries of the District Court which have been included, by stipulation (R., 19), in the transcript of record (R., 13, 14), after reciting the steps leading up to the entry of the decree as above set forth expressly states (R., 14) that "order was then and there made for FINAL

DECREE to the effect," &c., &c., as above indicated, and that an appeal therefrom prayed "in open court" was considered and allowed.

The decree of the trial court was entered September 20, 1913, and the term at which it was entered has since expired.

Rule 17 of the Rules of Practice in Equity provides that when a bill of complaint "is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree *shall be deemed* absolute, unless the court shall, *at the same term*, set aside the same," &c., &c.

The defendants below (appellants here) having waived the thirty days provided by the rule to intervene between the entering of the decree *pro confesso* and final decree, and having "asked that a final decree be made and entered *at this time* as if made at the expiration of said * * * thirty days;" and the term at which such decree was entered having since expired, no objection can now be taken on this score by either party to the cause, and said decree must be deemed absolute.

That the decree here complained of is a final and appealable decree would seem to be beyond cavil, and it is respectfully submitted that for the reasons next above set forth the motion to dismiss should be denied.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

Robert C. Bacon, et al., Public Service Commission of State of Vermont v. Rutland Railroad Company	Appeal from United States District Court, District of Vermont.

BRIEF OF RUTLAND RAILROAD COMPANY.

The only question for decision is whether the District Court had jurisdiction.

The Public Service Commission made an order requiring the Rutland Railroad Company to expend more than $4,000. in making certain changes in its freight and passenger stations at Vergennes, Vt., taking up tracks, etc., which the Company regarded as arbitrary and unreasonable and taking its property without due process of law. The Company promptly filed its bill, setting out in full detail all the facts relating to the order of the commission and the matters to which it related and alleged a violation of its rights under the Constitution of the United States.

It was authorized to apply to the United States District Court for protection, by section 24, chapter 62 of the Judicial Code, reading in part as follows:

"The district courts shall have original jurisdiction as follows: 1. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution * * * of the United States * * *."

The motion to dismiss the bill for want of jurisdiction having been overruled, defendants asked that the bill be taken *pro confesso* and final decree made, waiving the time which under the rules is necessary for such action by the court.

Final decree was accordingly made in which it was found that the order of the Commission was confiscatory, unreasonable and unlawful and would result in taking the property of the Rutland Railroad without compensation and without due process of law in violation of the constitution of the United States and the order of the commission was stayed and the commissioners enjoined until further order of the court.

"Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiff's property and infringes the Fourteenth amendment if the matter is open to inquiry." Prentis v. Atlantic Coast Line, 211 U. S., 210-223.

The commission contends that the district court had no jurisdiction because "none of the matters and things in said bill in equity alleged, arise under the constitution or laws of the United States or treaties made, or which shall be made, under their authority, and that all of the parties to said suit are citizens of the State of Vermont."

The jurisdiction of the federal courts has been invoked in so many similar cases that discussion of this claim seems needless. Some recent similar cases are:

L. & N. R. R. Co. v. Garrett, 231 U. S. 298.
Wood v. Vandalia Railroad Company, 231 U. S., 1.
Minnesota Rate Cases, 230 U. S., 352.
Missouri Rate Cases, 230 U. S., 474.
Oregon R. & N. Co., v. Campbell, 230 U. S., 525.
Allen v. St. L. Q. M. & S. Ry., 230 U. S., 553.
Siler v. S. & N. R. Co., 213 U. S., 175.
Siler v. Ill. C. R. R. Co., 213 U. S., 199.
See also Oregon R. R. & N. Co. v. Fairchild, 224 U. S., 510.

Appellants also contest jurisdiction because "the orator has a full, complete and adequate remedy at law in respect to each and every of the matters and things in said bill in equity complained of and alleged."

We are not aware of any remedy of any kind which the Railroad has on the law side of the United States Court for the alleged grievances. If the United States Court has jurisdiction it is immaterial what remedy might be obtained in law courts of the State. Moreover this is not a jurisdictional question which can be reviewed in an appeal such as this, Sculley v. Bird, 209 U. S., 481.

The only other reason assigned for denial of jurisdiction is "because by section 4599 and 4600 of the Public Statutes of Vermont as amended by Nos. 108 and 116 of the Acts of 1908, any party to a cause who feels himself aggrieved by the final order, judgment or decree of the said Public Service Commission has a right to take the cause to the Supreme Court of Vermont by appeal for the correction of any errors excepted to in its proceedings or in the form or substance of its orders, judgments or decrees on the facts found and reported by said commission. Said Supreme Court may reverse or affirm the judgments, orders or decrees of said Commission and may remand the cause to said Commission with such mandates as law or equity shall require, and said Commission shall enter judgment, order or decree in accordance with such mandates and the parties shall be governed by the laws governing the Court of Chancery, of the State of Vermont concerning appeals. The time for entering such appeal had not expired at the time of bringing the bill of complaint in this cause; upon taking the appeal as aforesaid the order, judgment or decree of said Commission shall be suspended during its pendency. Yet the plaintiff had not at the time of bringing said bill nor has it since availed itself of said right to appeal, therefore until such appeal is taken and final judgment, order or decree made in the cause, the plaintiff has no complaint of which the Honorable Court ought to take cognizance."

The statutes are not fully and correctly set out. They read:

> Sec. 4598. Pleadings, findings of facts. The forms, pleadings, procedure and rules of practice before said commission shall be prescribed by said commission and printed

for general use. Said commission shall hear all matters and state its rulings when excepted to and its findings of facts, which shall have the force and effect of the reports of special masters in courts of equity, whenever the cause is taken by an appeal to the supreme court.

Sec. 4599. Appeals. Any party to a cause who feels himself aggrieved by the final order, judgment or decree of said commission shall have the right to take the cause to the Supreme Court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees on the facts found and reported by said commission.

Sec. 4600. Same; entry; powers of supreme court. Appeals from said commission shall be taken and the cause entered in the Supreme Court in the county where the cause arises, in the manner and under the law and rules of procedure which govern such appeals from the court of chancery. The supreme court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of said commission and may remand a cause to said commission with such mandates as law or equity shall require; and said commission shall enter judgment, order or decree in accordance with such mandates. Such appeal shall not vacate any judgment, order or decree of said commission, but the supreme court or, when not in session, a judge thereof, may suspend execution of the same as justice and equity require, unless otherwise specifically provided by law.

When a person is given the right by the United States Constitution or statutes to commence his suit in a federal court, a state cannot by legislation or otherwise confine that person to state courts for a remedy. Goldey v. Morning News, 156 U. S., 518, 523. In other words Vermont cannot deprive a person of the right to file an original bill in equity in the United States courts for protection of his rights under the Federal Constitution, and a state law which attempts to limit review of an order of the Public Service Commission to appeal to the Supreme Court of the State and expressly or by implication forbids filing an original bill in the United States District Court is unconstitutional.

When the Hepburn law was before the Senate in 1906 an important question considered was whether it was necessary to ex-

pressly provide for a court review of orders of the Interstate Commerce Commission. It was determined that it was not necessary to expressly provide in the law for a judicial review but that the carriers would be entitled to this anyway and so long as the law did not expressly prevent such a review it would be held constitutional.

Senator Spooner said, Page 4162 of the Congressional Record of 1906:

> "It is conceded here by everyone that the door of the United States Court is open and cannot be closed to an original bill filed by the carrier to set aside the rate fixed by such commission upon the ground that it does not afford just compensation, that it is confiscatory in its nature and therefore is a taking of property in violation of the fifth amendment."

See also remarks of Senator Knox, Page 4377, and Senator Long, Page 4638 of the Congressional Record, 1906.

It is even more obvious that a State cannot prohibit a Public Service Corporation from commencing a suit in the Federal Court when it claims its constitutional rights have been violated by orders of the State Commissions.

In Prentis v. Atlantic Coast Line, it was pointed out that a state law which undertook to confine a carrier's review in Federal Courts of orders of a state commission to an appeal from the State Supreme Court to the United States Supreme Court and exclude carriers from filing an original bill in the circuit or district court of the United States, is unconstitutional for in that case the court said (page 228):

> "If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals, after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found.
>
> Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

It may be that the commission in stating its third ground for its motion to dismiss the bill for want of jurisdiction intended to claim that the right given by statute to appeal to the Supreme Court of the State of Vermont from an order of the commission, brings this case within the Prentis case just referred to and that upon the ground stated in that opinion, the bill should have been dismissed for want of jurisdiction.

Recent decisions of the Supreme Court of the State of Vermont make it obvious that such a claim is unfounded.

A reading of the Public Service Commission statutes of Vermont might leave one in doubt as to whether the Public Service Commission is a court or an administrative body.

The question was sharply presented in Sabre v. Rutland Railroad Company, 86 Vermont, 347, where the statutes were attacked as unconstitutional upon the ground that legislative, executive and judicial powers had been commingled contrary to Chapter 2 section 6 of the State Constitution. Two of the judges considered the statutes as unconstitutional upon this ground, but three of the judges sustained the statute, holding that the commission was an administrative body and not a court.

In Bessette v. Goddard, 87 Vt., 77, Chief Justice Rowell said in reference to the Sabre case.

> "In that case it became and was necessary to decide whether the Public Service Commission is a legal body and if so to define its nature and character, as such. The court met that necessity and decided that it is a legal body and defined it as being an administrative body clothed in some respects with functions of a judicial nature—quasi judicial functions the Court said they might be called, authorized in the exercise of the police power to make rules and regulations required for the public safety and convenience, and to determine facts on which existing laws shall operate; that in a sense it has auxiliary or subordinate delegable legislative powers; and that though it is not a court in a strict sense, yet, like many administrative bodies, it may exercise quasi judicial functions and is a governmental agency provided for the administration in respect to certain specific matters, of what, in a broad though true sense, may be called the police power.

This practically puts the Commission where the Federal Supreme Court puts the Interstate Commerce Commission, between which and our Commission, there is much similarity in purpose and function.''

The functions of the State Supreme Court when an appeal is taken from an order of the commission as provided in the statute have also been defined in recent decisions.

In Bacon v. B. & M. 83 Vt. 421, the Court said (page 457):

> ''It is suggested by the appellants that this court on appeal has the power of the Commissioners, that it is an Appellate Public Service Commission, and that as such it should deal with this whole matter. But the powers of this Court in that matter are clearly defined by statute and this suggestion cannot be entertained.''

In the Sabre case referred to it was claimed that the Public Service Commission statutes were unconstitutional, because attempt was made to confine judicial review to questions which might be raised upon the finding of facts by the commission, and that persons were entitled under the constitution to have their rights determined by a *judicial* finding of facts.

The Court apparently appreciated the force of this argument for it defines the questions which may be raised by appeal to the Supreme Court under sections 4599-4600, Public Statutes as follows (page 368):

> ''Under the statute providing for appeals the party upon whom an order is made may, if it pursues the orderly and not burdensome course pointed out by the statute, present to this court the questions of the propriety of the rulings of the commission in receiving or excluding evidence, the sufficiency of the evidence to sustain the findngs under the rule which obtains in this State that a mere scintilla of evidence will not sustain a finding, and the question of the sufficiency of the findings to warrant the order under the rule that the order must not be unreasonable or arbitrary in its character and

that it must bear some just relation to some reasonable purpose with a view to which authority to make it was conferred."

The court then clearly indicates that the carrier has an option, instead of appealing direct to the Supreme Court of the State, to file an original bill in chancery and thus obtain a judicial finding of facts for determination of the validity of an order of the commission.

The Court says (page 369):

> "Moreover the rights of a party are not necessarily limited to those which he may secure by an appeal. Section 4, Chapter 2, of our Constitution, providing that: The courts shall be open for the trial of all causes proper for their cognizance, means among other things, that by a proper proceeding the question of whether an administrative body has exceeded its powers, may be brought before and determined by the established courts. No special machinery need be provided for this purpose for the common law which is a part of the law of this State provides the requisite machinery. As the courts have authority to determine the constitutionality of legislative acts, so in all cases they have and must have authority to determine whether or not any board or commission claiming to act under legislative authority has exceeded its powers. The powers given to this court on appeal, and the common law remedies for the protection of rights which cannot be safeguarded by means of the hearing and appeal provided for by statute are sufficient to secure to every party interested in the orders of the Railroad Commission a vindication of his full rights against arbitrary and unreasonable action, usurpation of powers, and acts in excess of authority. These principles are firmly established in this jurisdiction."

In L. & N. R. R. Co. v. Garrett, 231 U. S., 298, 311, this Court said:

> "If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. * * * Presumably, the courts of the State as well as the Federal courts, would be open to the carrier for this purpose (Home Telephone Co. v. Los Angeles, 211 U. S., 265, 278) without express statutory provision to that effect."

The Vermont Constitution and statutes are entirely different from the Virginia Constitution which was considered in the Prentis case.

In Virginia an appeal could be taken from an order of the commission to the Supreme Court of Appeals which sat as a Public Service Commission, exercising all the legislative functions conferred upon the commission.

On appeal to the Supreme Court under the Vermont statutes it doesn't sit as an appellant Public Service Commission, and has none of the functions of that commission, but is confined in its review to questions of law.

Moreover the Vermont constitution prohibits the passage of a law similar to the provisions of the Virginia Constitution involved in the Prentis case, for Vermont's constitution, Chapter 2, section 6, provides:

> "The Legislative, Executive, and Judiciary departments shall be separate and distinct so that neither exercise the powers properly belonging to the other."

In Virginia, "The State Corporation Commission is established and its powers are defined at length by the constitution of the State. * * * Among its duties it exercises the authority of the State to supervise, regulate and control public service corporations, and to that end as is said by the Supreme Court of Virginia, and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. * * * An appeal to the Supreme Court of Appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made."

Prentis v. Atlantic Coast Line, 211 U. S., 210-224.

Respectfully submitted,

EDWIN W. LAWRENCE,

Attorney for Rutland Railroad Company.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

Robert C. Bacon, et al. Appellants, v. Rutland Railroad Company, Appellee.	No. 760.

MOTION TO DISMISS.

COMES NOW the Appellee, Rutland Railroad Company, and moves the Court to dismiss the appeal in this case for want of jurisdiction, because the decree of the District Court for the District of Vermont from which said appeal was taken is not a final decree.

EDWIN W. LAWRENCE,
Counsel for Appellee for the purposes of this motion.

To Rufus E. Brown,
Counsel for Appellants.

Please take notice that on the 24th day of November, A. D. 1913, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of my argument in support of said motion.

EDWIN W. LAWRENCE,
Counsel for Appellee for the purposes of this motion.

BRIEF.

The Rutland Railroad Company brought this suit in the District Court for the District of Vermont to have an order of the Public Service Commission of the State of Vermont, requiring the Railroad to make certain changes in its station and station grounds at Vergennes, Vermont, declared void, and the Commission perpetually enjoined from enforcing the order. Temporary injunction was asked for and it was prayed that this be made permanent as to the defendants and their successors in office.

Motion to dismiss for want of jurisdiction of the District Court was made and over-ruled, and the defendants waived the five days' time in which to file answer and asked that the bill be taken *pro confesso,* whereupon, a decree *pro-confesso* was entered and the defendants waived the rule and asked that a final decree be made. The Court then made what is denominated a "final decree," which adjudges that the Public Service Commission's order be stayed and the defendants enjoined until further order of the Court.

While all of this appears to have been done September 20th, the decree was in fact not signed until September 27th. A form of final decree like the decree subsequently made, excepting that it declared the order void, instead of that it should be stayed and permanently enjoining instead of enjoining until further order of Court was submitted to the Court by the Rutland Railroad September 22nd, it first having been submitted to defendants.

At that time a form of order proposed by appellants was submitted to appellee. This being the one which was subsequently signed as of September 20th. September 24th the following letter was sent to the Judge of the District Court for the District of Vermont:

RUTLAND RAILROAD COMPANY
General Attorney's Office

E. W. Lawrence,
General Attorney.

Rutland, Vt., September 24, 1913.

Hon. James L. Martin,
Brattleboro, Vt.

Dear Sir:

Since I saw you in Brattleboro Monday I have examined more carefully the form of final decree, which was handed to me

by Mr. Piper. I regard the decree as drawn as an Interlocutory Order and not a Final Decree; and that any decree which does not declare the order void and *permanently* enjoin it, is not final. There is no question I believe that the case will not be considered by the Supreme Court, unless the decree is final.

I think the decree should be substantially in the form I submitted, and as Mr. Bacon said to me when I saw him in Bellows Falls Monday, that he passed this form of decree on to you without comment, I assume it is satisfactory to him and to those interested in this matter on behalf of the State.

If there is any question about that form of decree being proper, I shall appreciate having an opportunity to be heard, and will—if necessary—go to Brattleboro, but I hope this may be avoided as I have been obliged to travel that way twice during the past week, and on account of a severe cold I wish to avoid traveling.

Yours very truly,

E. W. LAWRENCE,
General Attorney.

Mr. Piper was acting for appellants. The decree was subsequently signed without further notice to the appellee. The appellee did not consent to and is in no way responsible for the form of the so-called Final Decree, and in making this motion it is acting in accordance with notice given before the decree was signed.

It is elementary that an appeal can be taken to this Court only after final decree.

McLish v. Roff, 141 U. S., 661.
McGourky, v. T. & O. C. R. Co., 146 U. S. 536.
U. S. v. Jahn, 155 U. S. 109.

It has many times been held by this Court that a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance, the Court below will have nothing to do but to execute the decree which has already been entered.

Lodge v. Twell, 135 U. S. 232.
M. K. & T. R. Co. v. Dinsmore, 108 U. S. 30.
Bostwick v. Brinkerloff, 106 U. S. 3.
Re Norton, 108 U. S. 237.
Winthrop Iron Co. v. Moeker, 109 U. S. 180.
St. L. I. M. & S. R. Co. v. So. Ex. Co. 108 U. S. 24.
Grant v. Kendall, 119 U. S. 53.

The decree in this case is in the usual interlocutory form, and purports to retain control of the case for further order.

This motion is made because it is apprehended that it will be claimed by appellants in case this Court holds the District Court had jurisdiction of the suit, that the case should be remanded, the defendants allowed to answer, and the case proceed as if such answer had been filed in the first instance.

It may be that this decree has now become final by reason of the provisions of Rule 17 of the rules of practice in equity, to the effect that a final decree entered when the bill is taken *pro confesso* shall be deemed absolute unless the Court shall at the *same term* set aside the same, or enlarge the time for filing the answer upon cause shown upon motion and affidavit.

If the decree has become final by reason of this provision, or the appellants claim that a decision by this Court that the District Court had jurisdiction, finally disposes of the whole case, and this Court for any reason concurs in that view, we are content to proceed, but as the so-called final decree appealed from seems intended to retain the case for further order, this motion is insisted upon at this time, and it is respectfully submitted the appeal should be dismissed.

EDWIN W. LAWRENCE,
Counsel for Appellee.

State of Vermont, } Edwin W. Lawrence being duly sworn on
Rutland County, ss. } oath deposes and says, that on the 23rd day of October, 1913, he deposited in the mail copy of the motion, notice and brief set out above, addressed to Rufus E. Brown, Counsel for Appellants, at his proper address, viz.: The Strong, Burlington, Vermont, duly postpaid, and that in the due course of the mails said papers should reach him on the following day: and that the facts stated in the foregoing brief are true.

Before me,

MILDRED BROOKS,
Notary Public.